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No. 16 Orig'l.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

STATE OF MISSOURI, COMPLAINANT,
v.
CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, DEFENDANT.

Bill of Complaint

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

STATE OF MISSOURI, COMPLAINANT,

v.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, DEFENDANT.

The State of Missouri, complainant, by John T. Barker, Attorney-General thereof, brings this bill of complaint against the Chicago, Burlington and Quincy Railroad Company, a citizen of the State of Illinois and a resident thereof, and alleges:

I.

That complainant is one of the states of the United States of America and was admitted into the Union of said states under and by virtue of an act of the Congress of said states approved March 6, 1820, and that defendant is a railroad corporation organized and existing under the law of the State of Illinois, another of the states of the United States of America, and a resident and citizen of said State of Illinois, and owns and operates as a common carrier for hire a system of railroads in Illinois, Iowa, Nebraska, Missouri and other states.

Complainant further says that in the year 1907

the Legislature of Missouri enacted the law commonly known and designated as the "Maximum Passenger Rate Law, which said law was and is as follows:

> "Section 1191. Roads classified.—All railroads in the State of Missouri are hereby divided into four classes,' to be known as Class A, Class B, Class C and Class D. Class A shall include all through or trunk lines, railroads and all branch roads owned, leased, controlled or occupied by such through or trunk line railroad companies or corporations Class B shall include all other railroads or parts of such roads owned, leased, controlled or occupied, or which may hereafter be owned, leased, controlled or occupied, either wholly or in part, by any trunk line railroad company. Class C shall include all other railroads of a greater length than forty-five miles. Class D shall include all roads less than forty-five miles in length not owned, leased, controlled or occupied by any trunk line company or corporation."
>
> "Section 1192. Passenger Charges Regulated.—Any individual, company or corporation owning, operating, controlling or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile, for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In classes A, B and C, not exceeding two cents per mile, and in Class D, not exceeding four cents per mile: Provided, that no such

individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided."

"Section 1192a. Any individual, company or corporation, or any agent or officer thereof, who shall violate any of the provisions of section 1192 of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall pay a fine of not less than one hundred nor more than five hundred dollars." (Laws of Missouri, 1907, p. 171.)

That the Legislature which passed said act adjourned *sine die* on the 16th day of March, 1907, and that under and by virtue of Sec. 36, Art. IV of the Constitution of Missouri said act went into effect on the 14th day of June, 1907, and ever since that date has been effective.

Complainant further says that in the year 1905 the act commonly known as the Maximum Freight Rate Act, approved April 15, 1905 (Laws of Mo., 1905, pp. ————), which act fixed a maximum rate of freight charges for the transportation of certain classes of commodities and articles under conditions therein mentioned; that said act became effective June 16, 1905, and remained in force and effect until it was repealed, and a new law enacted in lieu thereof by the Legislature of Missouri in 1907; that the law repealing the said act of 1905 and enacted in lieu thereof is the act approved March 19, 1907 (Laws of Missouri,

1907, pages 171 to 173, now sections 3241, 3242 and 3243, Revised Statutes of Missouri, 1909); that the Legislature of Missouri in the year 1907 also enacted the law approved March 19, 1907 (Laws of Missouri, 1907, p. 187, now sections 3246 and 3247, Revised Statutes of Missouri, 1909); that said laws of Missouri of the year 1907 are commonly known as the Maximum Freight Rate Laws of Missouri of 1907, and that said laws regulate and fix the maximum rate of freight charges for the transportation of certain articles and commodities under conditions therein set forth, and that on June 14th, 1907, said law became, and ever since that time has been, effective.

That before the date June 15, 1905, when the Maximum Freight Rate Law of that year, above mentioned, became effective, a suit was instituted by the defendant in the Circuit Court of the United States for the Western Division of the Western District of Missouri, against the Attorney-General of the State of Missouri, and his assistants and successors, the Railroad and Warehouse Commissioners of said state and all shippers and passengers, thereby including your petitioner, to restrain and enjoin the said complainant from instituting any suits or taking any steps to enforce said act, for the alleged reason that same was unconstitutional and void as a burden upon interstate commerce, and because confiscatory and depriving said defendants of its property without due process of law.

That thereupon such proceedings were had that said United States Circuit Court made and issued its order and injunction restraining the Attorney-General of Missouri, his assistants and successors, the Railroad and Warehouse Commissioners of Missouri, and all shippers and passengers, including this

complainant, from instituting any suits or taking any steps to enforce said acts of 1905, or to collect any refunds, damages or penalties by reason of the fact that the freight rates exacted, or to be exacted, demanded, charged and received by defendant railroad were greater or to be greater than the rates prescribed in said acts of 1905; that thereafter, before the date of June 14, 1907, when the said Maximum Freight and Passenger Acts of 1907 became effective, in the same suit, by supplementary proceedings therein, and as a part thereof, said injunction theretofore granted and then subsisting, was amended, enlarged and extended, so as to enjoin in like manner, and did so enjoin the enforcement of said Maximum Freight and Passenger Act of 1907, hereinbefore set forth; and that said injunction remained in force and effect until the 6th day of February, 1914, at which time, in obedience to a decree from this Honorable Court to which said injunction proceeding had been brought on writ of error (230 U. S. 474) a decree was entered in the said United States Circuit Court of Missouri dissolving said injunction and dismissing the bill in said suit brought by this defendant.

Plaintiff further says that defendant herein (complainant therein) gave a bond in said injunction suit, which is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Complainant, v. HERBERT S. HADLEY, ATTORNEY-GENERAL JOSEPH RICE, JOHN A. KNOTT and FRANK W. WIGHTMANN, RAILROAD COMMISSIONERS OF MISSOURI, et al., Defendants.	No. 3006.

INJUNCTION BOND.

Know All Men By These Presents:

That the above complainant is held and firmly bound to the above named defendants in the penal sum of ten thousand dollars ($10,000.00) for the payment of which it bonds itself, its executors, administrators, successors and assigns. This bond is made upon the condition:

Whereas the court in the above entitled cause made an order on July 12, 1905, granting a temporary injunction; now, if said obligor pays, in case said injunction be dissolved, all damages ascertained herein to have been sustained by defendants or any of they, or any person becoming a defendant herein, then this obligation to be void; otherwise in full force and effect.

Witness the hand and seal of said party this ———— day of July, 1905.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, by its President.

Attest:

Secretary."

The foregoing bond was duly approved the 22nd day of July, 1905.

Complainant says that said bond was and is a cost bond, and does not in any wise prejudice its right to sue for and recover of defendant any overcharges of freight or passenger rates or fares, exacted and received from it by defendant, during the pendency of said injunction, in whatsoever form it may choose.

Complainant further states that during the time said Maximum Passenger Fare Law of 1907, aforesaid, was in effect and during the time the injunction aforesaid was in force, the officers, employes and agents of complainant were compelled to travel, and did travel, in the discharge of their general official duties, the road of defendant within said state from and to initial and terminal points in said state; and that as a condition upon compliance with which alone the defendant railroad company would accept for transportation said officers, employes and agents, defendant charged, demanded and exacted of complainant, and complainant, under such compulsion, and having no other available method in which to procure said transportation except by yielding to such exaction, was compelled to pay and did pay to defendant, and defendant did receive and retain from complainant, passenger fares for the transportation of its officers, agents and employes aforesaid, at a rate in excess of two cents per mile, which is and was the lawful and legal rate, and that defendant at all times had refused and now refuses to repay to complainant any part of said excess.

That the points to and from which the officers, agents and employes of complainant traveled, the dates thereof, and the fares exacted and paid are fully set out in detail in the statement hereto attached,

marked "Exhibit A," and made a part hereof, and that the total amount of said overcharges on account of passenger fares is $1,412.37; and that this amount is made up from more than five thousand items, as will appear from an examination of said "Exhibit A."

Wherefore, the premises considered, complainant prays that the said Chicago, Burlington and Quincy Railroad Company be made a party defendant to this bill and be required to answer the same, an answer under oath being waived; and that complainant have judgment against this defendant for One Thousand Four Hundred Twelve and 37/100 Dollars ($1,412.37), with interest thereon, and for such other and further relief, general and special, as in the premises may seem meet.

STATE OF MISSOURI,

By JOHN T. BARKER,
Attorney-General of Missouri.

State of Missouri, }
} ss.
County of Cole. }

I have read the foregoing bill of complaint by me subscribed, and the facts therein stated are true to the best of my information and belief.

JOHN T. BARKER,
Attorney-General of Missouri.

Subscribed and sworn to in the City of Jefferson, State of Missouri, before me, J. D. Allen, Clerk of the Supreme Court of Missouri, this 28th day of December, 1915.

J. D. ALLEN,
Clerk of Missouri Supreme Court.

v

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IN THE

Supreme Court of the United States

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STATE OF MISSOURI, COMPLAINANT,

v.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, DEFENDANT.

MOTION TO FILE BILL OF COMPLAINT.

Comes now the State of Missouri by John T. Barker, its Attorney-General, and moves for leave to file the annexed bill of complaint of the State of Missouri against the Chicago, Burlington and Quincy Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a resident and citizen of said State of Illinois, and complainant prays that due process of subpoena issue thereon according to the practice of this court.

JOHN T. BARKER,
Attorney-General of Missouri.

January 3, 1916.

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OCTOBER TERM, 1915.

No. 16, Original.

STATE OF MISSOURI, COMPLAINANT,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, DEFENDANT.

Motion to Strike Out Parts of Defendant's Answer and Short Memoranda in Support Thereof.

JOHN T. BARKER,
Attorney-General,
LEE B. EWING and
W. T. RUTHERFORD,
Assistant Attorneys-General,
Solicitors for Complainant.

THE LAW REPORTER PRINTING COMPANY, 518 FIFTH ST. N. W., WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 16, Original.

STATE OF MISSOURI, COMPLAINANT,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, DEFENDANT.

Motion to Strike Out Parts of Defendant's Answer and Short Memoranda in Support Thereof.

Now at this date comes the complainant herein, the State of Missouri, through its Attorney-General, and moves the court to strike out paragraph 10 of defendant's answer as found on page No. 6, said paragraph being in words and figures as follows:

> "(10) The act of 1905 and the acts of 1907 aforesaid was and is unconstitutional, invalid and void for that it at all times it was in force deprived defendant of its property without due process of law, denied to it the equal protection and were confiscatory, contrary to the provisions of the Constitution of the United States and the amendments thereto, and did not permit defendant to earn a fair or reasonable return upon the actual value of its property necessarily devoted to the service rendered, and that the compensation provided in the act of 1907 aforesaid did not pay the cost of service rendered. The facts in relation thereto were in detail pleaded by defendant in the former actions referred to and to such pleadings defendant now refers with the same effect

as if copied herein, and will, if deemed necessary, again plead such facts in as full detail as heretofore pleaded."

for the following reasons, to wit:

First. Because said paragraph of said answer constitutes no defense to the bill of complaint.

Second. That defendant can not plead confiscation in this case because that question was settled and finally adjudicated against this same defendant as to the overcharges herein sued for (230 U. S., 474) and defendant must restore and return to the complainant all money taken during the pendency of said injunction.

Third. Because it appears upon the face of the pleadings that said portion of said answer contains allegations and matters wholly irrelevant and immaterial to the determination of this cause.

Fourth. Because said matters do not constitute any defense to this action.

Fifth. Because it appears upon the face of the pleadings that defendant railroad secured an injunction against complainant and all shippers and passengers and while said injunction was in effect illegally charged and collected excessive passenger rates from complainant and others and that the Supreme Court of the United States held that such collections were unwarranted, and to permit defendant to retain said overcharges and to again litigate the question of confiscation and destroy said former adjudication would be contrary to the fundamental principle of equity.

Wherefore, complainant prays that paragraph 10 be stricken out and for nought held.

JOHN T. BARKER,
Attorney-General,

LEE B. EWING and
W. T. RUTHERFORD,
Assistant Attorneys-General,
Solicitors for Complainant.

MEMORANDA.

I.

The injunction suit brought by defendant in the District Court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunctions or decree must be restored to complainant and defendant will not be heard to deny such right and can not plead that such rates were confiscatory. Defendant must restore what it exacted under duress of such wrongful injunction, and confiscation is no defense.

Love *vs.* North American Co. et al. (U. S. C. C., Dec., 1915).
Railroad Company *vs.* Barker, 210 Fed. Rep., 902.
Bellamy *vs.* Railroad, 220 Fed. Rep., 876.
3 Cyc., 462, 469.
18 Ency. Pl. & Pr., 871.
Sec. 481, Freeman on Judgments.
Sec. 343, Beach on Injunctions.
Haebler *vs.* Meyers, 132 N. Y., 363.
Brown *vs.* Trust Co., 193 Fed., 626.
Pultney *vs.* Warren, 6 Ves., 73.
Railway Co. *vs.* R. R. Comm., 196 Fed. Rep., 558.
Railway Co. *vs.* Taylor, 134 Ill., 603.
Tift *vs.* Railway, 159 Fed. Rep., 555.
Fuel Co. *vs.* Brock, 139 U. S., 216.
New York *vs.* Brown, 179 N. Y., 303.
McGrew *vs.* Railway Co., 258 Mo.
Sec. 343, 1 Joyce on Injunctions, 525.
Lanyon *vs.* Chesney, 209 Mo., 1.
Stark *vs.* Lewis, 23 Miss., 151.
Ex Parte Walther Bros., 89 Ala., 237.
Martin *vs.* Woodruff, 2 Ind., 237.
Zimmerman *vs.* Bank, 56 Ia., 133.

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STATE OF MISSOURI,
Complainant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Defendant.

ANSWER.

FRANK HAGERMAN,
O. M. SPENCER,
Solicitors for Defendant.

CHESTER M. DAWES,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 16 Original.

STATE OF MISSOURI,
Complainant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Defendant.

ANSWER.

The defendant, Chicago, Burlington & Quincy Railroad Company, for answer to the alleged bill of complaint herein, avers:

(1) Complainant is one of the states of the United States of America and was admitted into the Union of said states under and by virtue of an act of Congress of said states approved March 6, 1820, and that defendant is a railroad corporation organized and existing under the law of the State of Illinois, another of the states of the United States of America, and a resident and citizen of said State of Illinois, and owns and operates as a common carrier for hire a system of railroads in Illinois, Iowa, Nebraska, Missouri and other states.

(2) In the year 1907 the Legislature of Missouri enacted the law (commonly known, but in no wise designated as the "Maximum Passenger Rate Law"), reading as set forth in the bill as Sections 1191, 1192 and 1192a.

(3) The Legislature which passed said act adjourned *sine die* on the 16th day of March, 1907, and under and by virtue of Sect. 36, Art. IV of the Constitution of Missouri said act did go into effect on the 14th day of June, 1907, and has ever since that date been effective, except during the time it was suspended by the injunction herein mentioned and subject to the defense that it was confiscatory and invalid.

(4) In the year 1905 the act commonly known as the Maximum Freight Rate Act, approved April 15, 1905 (Laws of Mo., 1905, pp. 102-104), which act fixed a maximum rate of freight charges for the transportation of certain quantities and classes of commodities and articles under conditions therein mentioned, said act became effective June 16, 1905, and remained in force and effect until it was repealed, except during the time it was suspended by the injunctions herein mentioned, and subject to the defense that it was confiscatory and, therefore, invalid. A new law, with certain reservations, was enacted in lieu thereof by the Legislature of Missouri in 1907. Said law repealing the said act of 1905 and enacted, with such reservations in lieu thereof, is the act approved March 19, 1907 (Laws of Missouri, 1907, pages 171 to 173, now sections 3241, 3242 and 3243, Revised Statutes of Missouri, 1909). The Legislature of Missouri in the year 1907 also enacted the law approved March 19, 1907 (Laws of Missouri, 1907, p. 187, now sections 3246 and 3247, Revised Statutes of Missouri, 1909). Said laws of Missouri of the year 1907 are commonly known as the Maximum Freight Rate Laws of Missouri of 1907. Said

laws regulate and fix the maximum mileage car rate of freight charges (but not all freight charges), for the transportation of certain articles and commodities under conditions therein set forth. On June 14th, 1907, said law became, and has ever since that time been effective, except as suspended by said injunctions and subject to said defense of invalidity, because each law was confiscatory.

(5) Before the date June 15, 1905, when the Maximum Freight Rate Law of that year, above mentioned, became effective, a suit was instituted by the defendant in the Circuit Court of the United States for the Western Division of the Western District of Missouri against the Attorney General of the State of Missouri, and his assistants and successors, the Railroad and Warehouse Commissioners of said state, and also against all the shippers and passengers to restrain and enjoin said officers (but not the complainant), from instituting any suits or taking any steps to enforce said act, for the alleged reason that same was unconstitutional and void as a burden upon interstate commerce, and because confiscatory and depriving said defendant of its property without due process of law.

(6) Thereupon such proceedings were had that said United States Circuit Court made and issued its order and injunction restraining the Attorney General of Missouri, his assistants and successors, the Railroad and Warehouse Commissioners of Missouri, and all the said shippers and passengers, not including complainant, from instituting any suits or taking any steps to enforce said acts of 1905, or to collect any penalties only (not alleged refunds or damages, as averred), by reason of the fact that the freight rates exacted, or to be exacted, demanded, charged and received by defendant railroad were greater

or to be greater than the rates prescribed in said acts of 1905, or permitted by law. Thereafter, before the date of June 14, 1907, when the said Maximum Freight and Passenger Acts of 1907 became effective, in the same suit, by supplementary proceedings therein (but not as a part thereof), a new order of injunction was, by consent of defendants, entered, enjoining the enforcement of the penalties in said Maximum Freight, but no injunction was granted against the enforcement of the said Passenger Act of 1907, hereinbefore mentioned, but on the contrary the court ordered defendant to comply with said law for a period of months, as a test of its confiscatory or non-confiscatory character, and the said injunction theretofore granted and then subsisting, was not in any wise amended, enlarged or extended. Afterwards, on final hearing, the decree of injunction was granted against the state officers only against the enforcement of both acts. Said final injunction remained in force and effect until the 6th day of February, 1914, at which time, in obedience to a mandate, not decree, from this court, to which said injunction proceedings had been brought on appeal ~~writ of error~~ (230 U. S., 474), a decree on the mandate was entered in the United States District (not Circuit) Court of Missouri, not dissolving any injunction, but dismissing the bill in said suit without prejudice. All the pleadings, orders and decrees in said causes are of record in this court on appeals from the *nisi prius* court, the defendant prays leave to refer to same as if fully set out herein (but same, if necessary, will be set out), without further pleading their contents, as they will not only disclose that the facts are not correctly alleged in the bill, but that complainant has no cause of action whatsoever.

(7) Defendant herein gave a bond in said injunction suit, in the words and figures set out in the bill of com-

plaint, but same was given solely upon the terms, and to secure the damages sustained by injunctions, not as implied by complainant's bill, but as set out in the orders granting the injunctions. The said bond was duly approved the 22d day of July, 1905, was not, and is not, a cost bond, and in every way does prejudice complainant's rights to sue for or recover of defendant in any form, any overcharge of any kind, if any was exacted or received from it by defendant, during the pendency of said injunction.

(8) During the time said Maximum Passenger Fare Law of 1907, aforesaid, was in effect and during the time the injunction aforesaid was in force, some of the officers, employes and agents of complainant did, without being compelled so to do, travel in the discharge of their general official duties, on the road of defendant within said state from and to initial and terminal points therein. This was without any condition, upon compliance with which alone the defendant would accept for transportation said officers, employers or agents (but not the complainant), and defendant charged them and demanded (not exacted) from them the rates only which were duly published and scheduled as provided by law. Complainant, neither under such compulsion nor otherwise was compelled to pay nor did pay to defendant, nor did defendant receive or retain from complainant, any passenger fares for the transportation of its officers, agents or employes aforesaid, at any rate. Defendant has at all times refused and now refuses to pay to complainant any part of the amounts alleged to have been paid by it as alleged excess charges. Whether the points to and from which the officers, agents and employes of complainant traveled, the dates thereof, and the fares exacted and paid, as set out in detail in the statement attached as "Exhibit A" to the

bill, of 5,000 items, are or are not correct, defendant has not knowledge sufficient to form a belief, and therefore calls for proof.

(9) The provisions of sections 1889, 1890, 3248, 4949, 4950, 4951, 4952 of the Revised Statutes of 1909, in force from at least the time of their adoption, shown in the marginal references in said Revised Statutes, are hereby referred to as part hereof, and benefit of the provisions thereof availed of the same as if copied herein, so that they may be fully considered, so far as they may affect the rights of the parties hereto. The claims referred to in the bill were not sued upon within the times required by the provisions of any of said sections, there is an improper attempt made to merge and join in one suit different alleged claims or payments made by different persons, and there is a plain, adequate remedy of each for any relief to which he, or the state, if it has the right to sue, might be entitled.

(10) The act of 1905 and the acts of 1907 aforesaid was and is unconstitutional, invalid and void for that it at all times it was in force deprived defendant of its property without due process of law, denied to it the equal protection and were confiscatory, contrary to the provisions of the Constitution of the United States and the amendments thereto, and did not permit defendant to earn a fair or reasonable return upon the actual value of its property necessarily devoted to the service rendered, and that the compensation provided in the act of 1907 aforesaid did not pay the cost of service rendered. The facts in relation thereto were in detail pleaded by defendant in the former actions referred to and to such pleadings defendant now refers with the same effect as if copied herein, and will, if deemed necessary, again plead such facts in as full detail as heretofore pleaded.

(11) Wherefore, the defendant shows because of each of the facts herein set forth (a) there is no jurisdiction in this court to hear or determine the bill of complaint, nor to permit the recovery of any penalty, (b) complainant has no cause of action whatsoever against defendant, (c) if it ever had any it is barred by limitation, and (d) complainant's bill should be dismissed at its costs.

FRANK HAGERMAN,
O. M. SPENCER,
Solicitors for Defendant.

CHESTER M. DAWES,
Of Counsel.

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NO. 16, ORIGINAL.

STATE OF MISSOURI, COMPLAINANT,

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, DEFENDANT.

BRIEF AND ARGUMENT OF DEFENDANT ON MOTION TO STRIKE OUT PART OF DEFENDANT'S ANSWER.

O. M. SPENCER,
Solicitor for Defendant.

DEISER PRINTING CO., ST. JOSEPH, MO.

IN THE

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STATE OF MISSOURI, COMPLAINANT,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, DEFENDANT.

BRIEF AND ARGUMENT OF DEFENDANT ON MOTION TO STRIKE OUT PART OF DEFENDANT'S ANSWER.

I.

The complaintant herein seeks to recover of the defendant the sum of $1,412.37, the amount alleged to have been paid in excess of 2 cents per mile by the officials of the State of Missouri, as railroad fare while traveling in their official capacity in the State of Missouri, during a period from 1907 to 1914.

The complaint is based upon the act of the legislature of Missouri of March 19th, 1907, fixing the maximum charge for transportation of passengers at 2 cents per mile.

The defendant herein, among other defenses, alleges in its answer the unconstitutionality of the law of

1907, fixing the passenger fare at 2 cents, on the ground that the rate is confiscatory of defendant's property. This defense appears in paragraph 10 of defendant's answer. The complainant has filed a motion to strike out this paragraph of the answer. The language of the motion would indicate that the complainant relies solely upon the fact that the constitutionality of this act fixing the passenger rate at 2 cents per mile in 1907 is *res judicata* as between the parties to this suit.

I do not understand it is claimed that the unconstitutionality of a legislative act arbitrarily fixing a rate is not a proper defense in a suit for alleged overcharges in excess of the rate fixed by said act, but the position taken by the Attorney General is that the defendant in this instance should be denied the right to make such a defense in this case, because the constitutionality of the Act of 1907, fixing the 2-cent rate in Missouri, has been adjudicated in a former suit between the parties to this action.

One ground of complainant's motion to strike out said paragraph of defendant's answer is as follows:

> "That defendant cannot plead confiscation in this case, because that question was settled and finally adjudicated against the same defendant as to overcharges herein sued for (230, U S. 474), and defendant must restore and return to complainant all money taken during the pendency of said injunction."

The first sentence in the memoranda citing authorithies in support of the complainant's motion to strike out is as follows:

> "The injunction suit brought by defendant in the District Court at Kansas City has been finally determined and the bill dismissed and the injunction dissolved."

These quotations are sufficient to show the complainants's misapprehension of both the law and the facts of the former suit, and the law as applicable to the pres-

ent case. The number of the Burlington case in the Missouri Rate Cases, reported in Vol. 230 U. S. p. 509, was No. 12, and the decree in the Burlington case is in the following language:

> "The decrees in No. 12 (and 11 other cases), are reversed and the cases remanded, with directions to dismiss the bills respectively without prejudice."

It will be seen, therefore, by this language that the Attorney General is mistaken in his statement of what disposition was made of the bill in the original case, having inadvertently left out of his statement concerning the bill being dismissed the words "without prejudice."

I am not going to argue orally to this Court the effect or legal meaning of the words "without prejudice," when added to a decree dismissing a bill. The books are all one way and the general, if not universal rule, is that the defendant herein stands in relation to this suit and any defense it has, just as if no former litigation over the rates in Missouri had ever occurred.

I respectfully submit the following authorities:

In the case of Northern P. Ry. Co. vs. St. Paul, M. & M. Ry. Co., 47 Fed. 636, it is stated:

> "The equity practice in England and in this country, as I understand it, is that, when a bill is dismissed, and there is an intention further to litigate the matter involved, the decree or order of dismissal uses the qualifying words 'without prejudice;' and where such words are used, although the relief sought in the new bill of complaint and the matter therein is precisely the same as in the original bill, the parties will be permitted to litigate their claims as if no previous suit had been commenced. Such decision 'without prejudice' is like a non-suit in a common law action."

In the case of Mobile vs. Cimball, 102 U. S. 691, in disposing of a similar contention, the Court said:

> "The decree was, therefore, reversed and the bill dismissed, but with prejudice, a condition which prevented the adjudication from operating as a bar to the same claim, if the complainants could, in another suit, obviate the defects of the existing bill."

In the recent work of Whitehouse on Equity Practice it is said (Section 395, p. 638):

> "When a bill is dismissed on such grounds, if the words 'without prejudice' are inserted in the decree, the plaintiff will be permitted to bring another suit at any time, involving the same subject matter, but if a bill is dismissed after hearing and it is not stated to be without prejudice, the decree is a bar to another suit for the same cause between the same parties."

In Street on Federal Equity Practice, Vol. 2, p. 817, Sec. 1348, the author states the effect of a dismissal without prejudice as follows

> "A general decree of dismissal, without more, renders all the issues in the case *res adjudicata* and constitutes a bar to any subsequent suit for the same cause of action. Hence, when a court dismisses a suit upon some ground that does not go to the merits of the cause of action, the decree of dismissal must either expressly adjudge that it is rendered for the specific reason upon which it is based, or it must expressly provide that it is made without prejudice."

The same view was taken by the Supreme Court of Washington in Averill Machinery Co. vs. Allbritton, 97 Pac. 1082. The Court said, in discussing a former decree:

> "It is argued that the Court considered and adjudicated the case upon its merits. The judgment entered by the Court, however, expressly

stated that 'said action be, and the same is hereby dismissed, without prejudice to the parties herein.' This recital clearly shows that the Court did not intend to determine the cause finally and upon its merits. While it is true the judgment entry further recites that testimony was taken, and that the testimony provided by the plaintiff was not sufficient to entitle it to the relief asked, still the further entry quoted above is wholly inconsistent with an intention to finally adjudicate the merits. When the words 'without prejudice' are used in an order of dismissal they have a well-defined meaning, and are always used for the express purpose of preventing the dismissal from becoming a bar to the bringing of another action. 'To obviate the general presumption of dismissal upon the merits the dismissal should be stated in express terms to be made 'without prejudice.' Wherever it is not actually upon the merits the term is used in order to reserve to the parties the privilege of enforcing their rights by subsequent proceedings, and to destroy the effect of dismissal as a bar.' 6 Enc. Pl. & Pr. 994-996. This Court has held that a judgment of dismissal without prejudice does not have the effect of *res adjudicata* on the merits of the controversy, even if the Court erred in refusing to give judgment on the merits. Bates vs. Drake, 28 Wash. 447, 68 Pac. 961."

Other authorities sustaining this view of the effect of a dismissal on appeal without prejudice are the following:

Durant vs. Essex Co., 7 Wall 109, 19 L. Ed. 154;
Shepherd vs. Pepper, 133 U. S. 626, 10 Sup. Ct. 438, 33 L. Ed. 706;
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Ballentine vs. Ballentine (Pa.), 15 Atl. 859;
O'Keefe vs. Irvington Real Estate Co. 87 Md. 196, 39 Atl. 428;
Lang's Heirs vs. Waring, 25 Ala. 625, 60 Am. Dec. 533;
Nevitt vs. Bacon, 32 Miss. 212, 66 Am. Dec, 609;
Tucker vs. Wilson, 68 Miss, 693, 9 South 898;
Epstein vs. Ferst, 35 Fla. 498, 17 South 414.

The effect, therefore, of the dismissal of the former suit without prejudice was to leave the matter of the reasonableness of the rates as though it had never been litigated and adjudicated. Certainly, the reasonableness of the rates could have been tested again in another suit in equity, for the dismissal was without prejudice. The mere fact that the Railroad Company is now a defendant and not a complainant, cannot bar its right to make the same defense again; for while the usual method of testing the reasonableness of rates is by suit in equity, yet the same defense can be made in any action at law. This right was recognized by the Supreme Court of the United States in Ex Parte Young, 209 U. S. 123, l. c. 165, when the Court said:

> "We do not say the company could not interpose this defense in an action to recover penalties, or upon the trial and indictment (St. Louis, etc., Ry. Co. vs. Gill, 156, U S., 649), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible."

Here we have a direct recognition by the Supreme Court that the defense can be made in an action at law, the Court, however, merely saying that a bill in equity would be more feasible.

That the defense of the reasonableness of the rates can be made in an action at law was expressly recognized by the Supreme Court of the United States in St. Louis & S. F. Ry. Co. vs Gill, 156 U. S. 649. In that case a passenger sued a railroad company for a penalty for charging him more than 3 cents per mile, the rate fixed by statute. The railroad company offered to show that the rate of 3 cents per mile was reasonable, and upon objection the offer was rejected. In disposing of this contention the Supreme Court held that when a state prescribed a rate for a railroad the company may raise the question of the reasonableness by way of defense to an action for the recovery of penalties for violating the same.

What the defendant is attempting to do in this case was done by the railroad company in the case of Northern P. Ry. C. vs. North Dakota, 236 U. S. 585. In that case the Attorney General of the state instituted proceedings against the railroad company to obtain a mandatory injunction requiring them to conform with certain maximum rates fixed by statute. The railroad companies answered that the rates were not remunerative and unreasonable. The Supreme Court of the State overruled these contentions and held that the evidence was not sufficient to overcome the presumption of the reasonableness of the rates, and this decree was affirmed without prejudice to the rights of the railroad company by the Supreme Court of the United States (216 U. S. 529). The case was again reopened, tried, and again affirmed by the Supreme Court of the State (26 N. Dak. 438), but on the second appeal to the United States Supreme Court the rates were held to be confiscatory (236 U. S. 585).

In the case of Chicago, M. & St. P. Ry. Co. vs. State of Minnesota, 134 U. S. 418, the State applied for a writ of mandamus to compel the railroad companies to place in force certain rates fixed by the Railroad Commission. To this writ the railroad companies answered that the

rates were confiscatory. Their right to make the defense in such an action was sustained by the Supreme Court of the United States.

In Michie on Carriers, Vol 1, p. 119, Section 139, it is said:

> "Where the legislatures choose to act directly on the subject by themselves, establishing tariff rates and prescribing penalties, there is no opportunity to resort to a compendius remedy, such is as proceeding in equity because there is no public functionary or commission which can be made to respond, and therefore, if a carrier is to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

Therefore, the former suit, having been dismissed without prejudice, the decree in that action is not binding in its action and is not *res adjudicata* on the question of the confiscatory nature of the 2-cent statute. The defense of the reasonableness of the rates in question can, as will be seen by a perusal of the foregoing authorities, be made either in a suit in equity where the railroad companies are defendants, or it can be raised by answer in a suit by the injured party, or the state for a violation of the statute. This conclusion seems to follow from the decisions cited.

II.

The principle of law contended for by complainant is not in dispute. The question is, are those authorities applicable to the present case. A party cannot be asked to make restitution until it is legally established that he is wrongfully in possession of property belonging to another. The very issue in this case at the present time.

The defendant's contention herein is that this Court has never yet passed upon the constitutionality of the Act

of 1907. Although its constitutionality was involved in the old Missouri Rate Cases the railroads in those cases misconceived the method of showing the value of their property, hence the Court in those cases was unable to pass upon the merits of the case, but dismissed it without prejudice. The use of the words "without prejudice" means without prejudice because of something in the past, something that has already occurred. The term cannot apply as the Attorney General would apply it, to future rights, because future rights would not have been affected if the case had been heard on its merits and simply dismissed.

The complainant is seeking to recover overcharges for a period of seven years from 1907 to 1914. The only period of time tested or attempted to be covered by the evidence in the old Rate Cases, on passenger fares, was between 1907 and 1909. As to no other period of time can it be said the rates involved in the alleged overcharges herein sued for were ever at issue By no possible construction can it be contended that there has been an adjudication of the reasonableness of the statutory rate as applied to a period of years that was never covered by the evidence.

In the original rate case this Court did not find the revenue under the Act of 1907 afforded a fair return upon the value of the property involved in the public use under said statute. The Court in fact, found there was no adequate proof of value; not that the value had been ascertained and failed in amount, but simply that there was no adequate proof of value such as this Court could weigh in the balance against the revenue derived under the Freight and Passenger Acts, And without the test between earnings and value there could be no test of constitutionality.

O. M. SPENCER,
Solicitor for Defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

NO. 16, ORIGINAL.

STATE OF MISSOURI, Complainant,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

BRIEF OF COMPLAINANT IN SUPPORT OF MOTION TO STRIKE OUT PART OF DEFENDANT'S ANSWER.

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The injunction suit brought by defendant railroad in the District Court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunction or decree must be restored to complainant and defendant will not be heard to deny such right and cannot plead that such rates were confiscatory. Therefore such plea should be stricken out 12

II.

Where a carrier alleges a rate to be confiscatory it may litigate the question by enjoining the representatives of the state. It cannot litigate the question against individuals. This would be a collateral attack, and as a direct method is provided that method is exclusive 34

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

NO. 16, ORIGINAL.

STATE OF MISSOURI, Complainant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

BRIEF OF COMPLAINANT IN SUPPORT OF MOTION TO STRIKE OUT PARTS OF DEFENDANT'S ANSWER.

STATEMENT.

The complainant filed in this court a motion to strike out paragraph number 10 of defendant's answer, which paragraph pleads confiscation. The motion to strike out is as follows:

"Now at this date comes the complainant herein, the State of Missouri, through its Attorney-General, and moves the court to strike out paragraph 10 of defendant's answer as found on page No. 6, said paragraph being in words and figures as follows:

> '(10) The act of 1905 and the acts of 1907 aforesaid was and is unconstitutional, invalid and void for that it at all times it was in force deprived defendant of its property without due process of law,

> denied to it the equal protection and were confiscatory, contrary to the provisions of the Constitution of the United States and the amendments thereto, and did not permit defendant to earn a fair or reasonable return upon the actual value of its property necessarily devoted to the service rendered, and that the compensation provided in the act of 1907 aforesaid did not pay the cost of service rendered. The facts in relation thereto were in detail pleaded by defendant in the former actions referred to and to such pleadings defendant now refers with the same effect as if copied herein, and will, if deemed necessary, again plead such facts in as full detail as heretofore pleaded.'

for the following reasons, to wit:

First. Because said paragraph of said answer constitutes no defense to the bill of complaint.

Second. That defendant can not plead confiscation in this case because that question was settled and finally adjudicated against this same defendant as to the overcharges herein sued for (230 U. S., 474) and defendant must restore and return to the complainant all money taken during the pendency of said injunction.

Third. Because it appears upon the face of the pleadings that said portion of said answer contains allegations and matters wholly irrelevant and immaterial to the determination of this cause.

Fourth. Because said matters do not constitute any defense to this action.

Fifth. Because it appears upon the face of the pleadings that defendant railroad secured an injunction against complainant and all shippers and passengers and while said injunction was in effect illegally charged and collected excessive passenger rates from complainant and others and that the Supreme Court of the United States held that such collections were unwarranted, and to permit defendant to retain said overcharges and to again litigate the question of confiscation and

destroy said former adjudication would be contrary to the fundamental principle of equity.

Wherefore, complainant prays that paragraph 10 be stricken out and for nought held."

This defendant railroad, along with all other railroads in Missouri, secured an injunction against the passenger and freight rate laws, alleging that they were confiscatory. 168 Fed. Rep. 317.

The Supreme Court of the United States in the Missouri rate cases, 230 U. S. 471, held as to this defendant railroad that it had failed to sustain its plea of confiscation and reversed the case with directions for the lower court to dissolve the injunction and dismiss the bill without prejudice, which has been done. Railroad Co. v. Barker, 210 Fed. Rep. 902.

Therefore, all of that litigation is at an end.

The State of Missouri thereupon brought suit in the Supreme Court of the United States to recover of the defendant railroad the money belonging to the state for the traveling expenses of its officers during such injunction.

The defendant railroad thereupon by said paragraph 10 alleges again that the maximum freight and passenger rate laws of 1907 were confiscatory and wishes again to litigate the question of confiscation.

Complainant, the State of Missouri, has filed its motion to strike out this plea of confiscation on the ground that that matter was determined when the case was in this court before and that defendant railroad cannot again litigate the question of confiscation.

It will be apparent that this is a very vital question as there are thousands of claims against this and other railroads for overcharges collected during said injunction, and if the railroads can plead confiscation against every claimant and relitigate that question, then no ordinary litigant can afford to litigate this question with these railroads, and their property will be taken without trial.

It will cost thousands of dollars for each claimant to litigate this question of confiscation, and the complainant takes the position that inasmuch as this defendant railroad took the money of the state during the life of an injunction decree which was afterwards reversed and set aside that such money should now be returned.

BRIEF.

I.

The injunction suit brought by defendant railroad in the District Court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunction or decree must be restored to complainant and defendant will not be heard to deny such right and cannot plead that such rates were confiscatory. Therefore such plea should be stricken out.

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II.

Where a carrier alleges a rate to be confiscatory it may litigate the question by enjoining the representatives of the state. It cannot litigate the question against individuals. This would be a collateral attack, and as a direct method is provided that method is exclusive.

In Re Englehard & Sons Co., petitioners, 231 U. S. 645; 58 L. Ed. 416.

R. R. Co., v. Minnesota, 134 U. S. 418.

ARGUMENT.

I.

The injunction suit brought by defendant railroad in the District Court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunction or decree must be restored to complainant and defendant will not be heard to deny such right and cannot plead that such rates were confiscatory. Therefore such plea should be stricken out.

Defendants will not be heard to question the legality or constitionality of the maximum freight and two-cent passenger fare laws in this action. *If the rates charged were the statutory and lawful rates then the confiscatory character of said rates could not be in issue, because, clearly, the defendant could not be liable for exacting the lawful rate of charges. On the other hand, if it did charge rates in excess of the statutory rates, it did so of its own free will, and exacted and obtained from shippers and passengers* (of which this complainant was one) *such excess charges during the pendency of, and under duress of, the injunction, sued out to test the confiscatory character of said rates. The United States Supreme Court reversed the judgment and order of the United States Circuit Court at Kansas City, and dissolved said injunction. Said injunction was held to be wrongful and unlawful.*

Therefore, defendant must restore whatever advantage, money or property it obtained from complainant by reason of said injunction. *It necessarily follows that a plea of the confiscatory character of the rates has no place in and will not be tolerated in the present controversy. To permit such a plea here would be to prostitute a court of equity to the partisan purpose of aiding one party to a suit to obtain an unconscionable advantage of another, and would make of its high processes*

engines of oppression and wrong, instead of instruments of justice, equity and good conscience. The party who wrongfully obtained the injunction must restore the fruits obtained by his wrongful acts. Neither law or equity will permit its process to be used for and prostituted to a wrongful purpose.

The courts of the United States and of every state in this Union, as well as able text writers, present an unbroken array of authorities sustaining complainant's contention here —and the doctrine of restitution.

In *Section* 343, 1 *Beach on Injunctions* 348, the doctrine of restitution is applied in injunctions, upon dissolution, where it is said:

> Where the act sought to be enjoined is done before the complainant's bill is filed, and he knows it is already done, a preliminary injunction issued to prevent the act is improvident and will properly be dissolved on the hearing, and *if plaintiff in such a case has obtained an advantage by acting when his opponent's hands are tied, he will be compelled to relinquish it*, so that the original status may be restored. Thus where a preliminary injunction forbidding the defendant from taking possession of certain land is improvidently issued, after he has been in possession, and *the complainant retakes possession pending the injunction, defendant is entitled to a writ of restitution.* * * * *Upon the dissolution of an injunction against defendant for forcible entry*, the court should, on his motion, *award him a writ of restitution to restore to him the possession which he yielded under the injunction.*

In *Section* 1096, *Spelling on Injunctions and Other Extraordinary Remedies* (2nd Ed.) 935, it is said:

> *Upon the dissolution of an injunction it is proper to undo what has been wrongfully done under it;* as,

for example, *to restore possession of premises to one disposed thereby.* Accordingly, when, on application for an injunction, the chancellor grants a temporary restraining order until the hearing, and, after this and before the hearing, the defendant violates the restraining order, and takes possession of land in defiance thereof, it is competent for the chancellor at the hearing, though he may refuse the injunction, to direct the sheriff to restore the parties to their *status* at the time the bill was filed.

In *Section* 343, 1 *Joyce on Injunctions* 525, it is said:

> When the act sought to be enjoined is done before the complainant's bill is filed, and he knows it is already done, a preliminary injunction issued to prevent the act is improvident and will properly be dissolved on the hearing, and *if plaintiff in such a case has obtained an advantage, by acting when his opponent's hands are tied, he will be compelled to relinquish it,* so that the original status may be restored. Thus where a preliminary injunction forbidding the defendant from taking possession of certain land is improvidently issued, after he has been in possession, and *the complainant retakes possession, pending the injunction, defendant is entitled to a writ of restitution.* * * * *Upon the dissolution of an injunction against defendant for forcible entry, the court should,* on motion, *award him a writ of restitution to restore to him the possession which he yielded under the injunction.*

In 3 Cyc. 469, the rule is stated as follows:

> A party who has been deprived of possession of land under an erroneous judgment or decree *is entitled to restitution of the rents and profits of the land.* And, where the restitution is in money,

> interest may be allowed thereon from the time of payment. It has been held that costs may also be included in the order of restitution in a case where the aggrieved party is entitled to restitution.

In Carson v. Suggett, 34 Mo. 364, there was a suit brought for a negro, and plaintiff in that suit recovered judgment for the negro and damages. The negro was delivered by the defendant and the damages paid. Afterwards the case was taken to this Court, which reversed the judgment of the lower court and remanded the cause, where the plaintiff dismissed the case.

This suit was then brought for the return of the negro and the damages paid, and also for the hire of the negro while the prevailing party in the first suit had him; in other words, *to recover what had been lost by the judgment, which had been reversed on appeal.* The defendant in the case in which restitution was sought endeavored to defend *on the ground that the defendant really owned the slave.* The Court, however, refused the right to so defend and *thwart restitution* in the suit therefor, holding that it was the obligation to make such restitution, *irrespective of any rights that the defendant might have to the negro,* remitting the defendant to an action after the restitution had been made.

Sustaining the recovery in its entirety, the Court held as follows:

> Where the judgment of the inferior court is reversed by the Supreme Court, the plaintiff in error or the appellant *is to be restored to all that he has lost by the original judgment,* and *this without any reference to the rights of the plaintiff in the original suit.* Where the plaintiff, after the reversal of the judgment in his favor, voluntarily dismissed his suit, and the defendant *sued for restoration of what he had lost by the judgment,* an answer *setting up the original claim of the plaintiff was properly stricken out.*

The Court said, beginning on page 365:

> The defendant answered, and, among other things set up as defenses, alleged the *original title of Suggett to the negro* (but did not set up any title acquired since the judgment of the Supreme Court). This defense was, on motion, *stricken out* of the answer. This was proper. After the decision of the case by the Supreme Court Carson's estate *was entitled to be restored to all that it had lost by means of the original judgment of the Circuit Court.* This of course *included the return of the negro and the money, delivered in performance of the original judgment;* and this should have been done *without any reference to or effect upon Suggett's right to the negro, and which he might have established and enforced in that or another action.* Having dismissed that action voluntarily, he cannot now require Carson's administrator to establish his title to the property, nor can he resist the claim of Carson's estate *by showing title in himself acquired before the judgment of the Circuit Court in the former case.*

In Gott v. Powell, 41 Mo. 416, the Court states the doctrine, on page 420, as follows:

> *The restitution to which the party is entitled upon the reversal of an erroneous judgment is everything which is still in the possession of his adversary.* Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterwards reversed, so far as he is concerned his title is at an end, and the land or goods must be restored in specie—not the value of them, *but the things themselves.*

In Haebler v. Meyers, 132 N. Y. 363, there was an action for money had and received for money which a party had

obtained on an order, and during the pendency of an injunction, which was afterwards reversed, the Court said, beginning on page 366:

> Restitution was remedy well known to the common law. *Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal.* It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment, *but restored to the aggrieved party that which he had lost in consequence thereof.* It was usually a part of the judgment of reversal which directed "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid." A writ of restitution was thereupon issued, provided the amount that the appellant had lost or paid under compulsion appeared of record, as by the return of an execution satisfied; otherwise process in the nature of an order to show cause was first issued, known as a "*scire facias quare restitutionam habere non debet.*" Toml. Law Dict., title Restitution; 2 Lil. Abr. 472; Rolle, Abr. 778; Westerne v. Creswick, 4 Mod. 161; Wilkinson's case, Cro. Eliz. 465; Goodyere v. Ince. Cro. Jac., 246; Manning's case, 8 Coke, 94; 2 Tidd Pr. 1033; 1 Burrill, Pr. 292.
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> * * * * * * *
>
> We have before us *an effort to procure restitution by an independent action in the nature of indebitatus assumpsit, based upon the theory that the law will imply a promise from the conduct of the defendants and the circumstances of the case.* It has been re-

peatedly held that *such an action will lie to recover back money paid on a judgment pending an appeal which resulted in a reversal.* The subject was carefully examined in Clark v. Pinney, 6 Cow. 299, where it was held that the court would not compel the party to resort to the antiquated remedy of *scire facias*, but would permit a recovery *by a direct action as for money had and received.* In delivering the opinion, Chief Justice Savage said: "The general proposition is that this action lies in all cases where the defendant has in his hands money which *ex aequo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment, which subsequent to the payment of the money is reversed, *the legal conclusion is irresistible that the money belongs to the person from whom it was collected.*" This principle was recognized by the Supreme Court of the United States, in Bank of the United States v. Bank of Washington (6 Pet. 8), where it was declared that: "*On reversal of a judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost,*" and that *he might proceed by action* scire facias, or order. The authorities uniformly support this position, and out of many that might be cited the following are sufficient to illustrate the subject: Sturges v. Allis, 10 Wend. 355; Maghee v. Kellogg, 24 Wend. 32; Norton v. Conns, 3 Denio 130; Langley v. Warner, 1 Sandf. 209; Lott v. Swezey, supra; Kidd v. Curry, 29 Hun. 215; Wright v. Nostrand, 100 N. Y. 616, 1 Cen. Rep. 235; Travelers Ins. Co. v. Heath, 95 Pa. 333.

The court further said, beginning on page 368:

While the erroneous order was a protection to the sheriff who acted upon it while in force, *it is*

no protection to the defendants, because it was subsequently reversed on appeal, and became, as to them, the same as if it had never been made. When they accepted the money that was paid over in consequence of the order that they procured, *they knew that if the order should be reversed and their motion denied, they would no longer be entitled to it, and could not in fairness retain it.* As they acted with knowledge of all the facts, *it would be inequitable for them to retain money received under such circumstances,* and we see no reason why the law should not *infer a promise of restitution* the same as if the money had been collected under execution. In either case, the inference rests upon the fact *that money was received by those who knew at the time that it might ultimately be decided that they were not entitled to it.* But to whom did the implied promise run? *Obviously to those who would have been entitled to the money upon the reversal of the order,* provided it had not been paid to the defendants. It was so held in Camerton v. McCarklé (15 Grat. 177), which is precisely in point. *The law implies the promise for the benefit of the injured party,* and if the situation were the same as it was when the money was paid, repayment to the sheriff would be required, because he would be entitled to the possession of the fund under the restored attachment. * * * But the situation has changed, as the plaintiffs have become entitled to the money by virtue of their judgment and execution. They, and they alone, therefore, can avail themselves of the implied promise, which is *plastic* in character and for the benefit of whom it may concern. *The law implies a promise because in equity and good conscience the defendants ought to have promised, and it will not permit them to say that they did not.* It would be an anomaly to hold that the law will imply a promise in favor of one having title, but not in favor of one holding the

> first lien, when through the action of agencies known to the parties to be in operation and in the ordinary course of legal procedure, the lien would have ripened into a title but for the erroneous order. *The defendants procured the order and acted upon it, and thereby obtained money that did not belong to them, and, under such circumstances, the law presumes that they engaged to do what reason and justice require them to do. They are, therefore, under an obligation to restore the money.*

In Wangelin v. Goe, 50 Ill. 459, the doctrine of restitution was applied in an *injunction suit.* In that case, a party obtained an injunction against one who had forcibly intruded upon premises in possession of the former, and upon demand under the injunction, the wrongdoer refused to restore possession. An attachment for contempt was thereupon issued against the latter for his alleged refusal to obey the injunction, upon learning which he surrendered possession to the sheriff. It was held that, the injunction being *wrongfully sued out,* upon its dissolution, the court should have awarded a writ of restitution, so as to restore to the party who had made the forcible entry the possession which he had yielded in view of the proceedings under the injunction.

The court said, beginning on page 469:

> The record in this case further shows that the appellants, refusing to surrender possession of the mill, on the service of the writ of injunction, an attachment for *the contempt was issued against the defendants,* returnable before the judge at chambers, which coming to the knowledge of the defendants, *they surrendered the possession to the sheriff,* and no further proceedings were had on the attachment.
>
> Under these circumstances, and *as the injunction was wrongfully sued out,* and as, *by it, or through the instrumentality of proceedings under it, the de-*

> *fendants have been deprived of the possession of the mill,* and which, for aught which we know, may be their rightful property, we deem it but just that a writ of restitution should issue *to restore them to the possession of the premises.* In the ordinary suit of ejectment, when, upon the recovery by the plaintiff, a writ of possession issues in his favor, upon a new trial and recovery by the defendant, a writ of restitution issues in his behalf, so in this case, *appellants having been deprived of the possession by the action of the Circuit Court, it is but just and equitable they should be restored to the possession they occupied at the time these proceedings commenced,* and complainant remitted to his action or ejectment, or forcible entry and detainer, to recover the possession.

In Ex Parte Walter Brothers, 89 Ala. 237, in applying the doctrine of restitution, the court said, beginning on page 238:

> We are unable to concur with counsel who appear against the application that money paid on, and in obedience to a decree of the Chancery Court, can, in any case, said *to be paid voluntarily,* in such sort *as to preclude its recovery in the event of a reversal of the decree.* We understand the law to be settled to the contrary. * * *
>
> *We can conceive of no case in which a party, who pays money on a decree which is subsequently reversed, is not entitled to have restitution of what he has paid, and to be thus reinstated in the position and to all the rights he lost prior to the rendition of the erroneous decree.* It is not material what those rights were, or would probably, or ever certainly and necessarily, be determined to be, in the further progress of the litigation. He is entitled to have his final equities adjudicated while he yet occupies

whatever vantage-ground was his in the inception of the contest, and from that standpoint to invoke the judgment of the law on the issues he presents. When he asks, after the reversal of a decree which has erroneously *adjudged his rights and disturbed his relations in the case, to have his original status restored*, it is no answer to his petition to say that, *on a final hearing of the cause, it will again be decreed that he pay that of which he now seeks restitution.* To so hold would be to prejudge the case, to decide in advance of the submission of the issues on pleading and proof that the party, who has been put to a disadvantage by the execution of a wrongful decree, though properly before the court, is not entitled to any relief in the case. On the one hand, we are unable to see any predicate for the claim of the other party *to retain what, confessedly, he has wrongfully received.* He has *no right to the money* involved in the litigation, in contemplation of law, *until there should be a correct determination of the matters in dispute*, however clear his rights may have been in point of fact. He, therefore, proceeds with the cause, having an undue advantage of his adversary, and is in fact *in the attitude of having gained what he claimed before his right to it had or could have been determined.* We entertain no doubt therefore of the absolute right to have restitution made on the one hand, and the absolute correlative duty to make restitution on the other, wholly regardless of considerations looking to the final equities of the parties.

In Starke v. Lewis, 23 Miss. 151, in which there was a suit concerning slaves, during the pendency of the injunction, the slaves in controversy were directed to remain in the possession of the complainant. The decree of injunction was reversed, the injunction dissolved, and the bill dismissed by the High Court of Errors and Appeals. The

complainant had given bond and surety in the trial court to have the slaves forthcoming to answer the decree of the court. After the decision of the Appellate Court, the party refused to deliver the slaves, and the adverse party then filed his petition for restitution. Upon appeal from an award of restitution, the Court held that it could not be maintained, because of the dismissal of the bill by the Appellate Court, as no cause was pending, but did hold that the party had an independent action either upon the bond, or for the possession of the slaves, in no wise limiting the recovery to an action upon the bond.

The Court said on page 152:

> The cause was finally disposed of by the decree dismissing the bill, and the parties could not be again brought into court by petition. Had the bill been retained, and the cause remanded to the chancery court, then a compliance with the decree might have been enforced by that court. But as the party had a decree entered in this court, for the dismission of the bill, at the costs of the complainant, that was a final end of the case, and a failure of the complainant to deliver the slaves left the other party to an action on the bond, or *to an original suit to obtain possession.*

In Savannah Shoe Factory v. Kaiser, 108 Ga. 767, there appears to have been an order *granting an injunction* and appointing a receiver, by virtue of which property was taken out of the hands of the sheriff, placed in the hands of the receiver and sold. This order was afterwards reversed by the Supreme Court of Georgia, and restitution thereafter compelled. Sustaining this restitution, the Court said (referring to the order of injunction):

> When property, *by virtue of such original order of the judge of the superior court, was taken out of the hands of the sheriff and placed in the hands of the*

> *receiver and by the latter sold,* it was not error for the court, upon application of counsel for the defendants under whose fi. fas. the property had been levied on by the sheriff before the receivership, when the remittitur of this court was duly filed and made the judgment of the court below, *to direct the receiver to pay into the hands of the sheriff the proceeds of said sale,* the plaintiffs not offering to amend their pleadings or to show any different state of facts, entitling them to a receivership that did not exist when the temporary injunction was granted and the receiver appointed."

So, it clearly appears that an injunction is not hedged with any such judicial divinity as to exempt it from the operation of the rule of restitution, when money, property or anything of value has been obtained, during the pendency thereof, directly or indirectly, through its instrumentality or under its protection. The principle to be, and that has always been, applied, *is just the same upon the reversal of decree of injunction as in the case of any other judgment or decree.*

In Brown v. Detroit Trust Company, 193 Fed. Rep. 672, the Circuit Court of Appeals for the 6th Circuit again stated the doctrine to be applied, where it said on page 626:

> "Certainly, if restitution is possible the judgment appealed from would be affected by the reversal. In the courts of the United States the rule is broadly settled that upon the reversal of an erroneous judgment *the law raises an obligation in the party to the record who has received the benefit of the judgment to make restitution to the other party for what he has lost,* and that the mode of effecting this result may be regulated according to circumstances. See Bank of United States v. Bank of Washington, 6 Pet. 8, 8 L. Ed. 299; Ex parte Morris & Johnson, 9 Wall.

605, 19 L. Ed. 799; Northwestern Fuel Co. v. Brock, 139 U. S. 216, 221, 11 Sup. Ct. 523, 35 L. Ed. 151."

In Northwestern Fuel Co. v. Brock, 139 U. S. 216, 35 L. Ed. 151, Bank v. Bank, *supra*, is heartily affirmed, where the Court said, beginning on page 219:

> *The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period*, and the only question of discussion there has been as to the proceedings to enforce the restitution. Thus in Anonymous, 2 Salk. 588, it was held by Holt, Ch. J., that "where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed there, because it appears on the record that the money is paid, the party shall have restitution without a scire facias, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a scire facias suggesting the matter of fact, viz., the sum levied, etc."
>
> The same doctrine has been fully recognized by this court in United States Bank v. Bank of Washington, 31 U. S. 6 Pet. 817 (8: 299, 304). In that case the court, after observing that the party against whom an erroneous judgment has been enforced does not lose his remedy against the party to the judgment, said:
>
> "*On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost*, and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a scire facias, when the record shows the money has been paid, and there is a certainty as to what has been paid, and there is

a certainty as to what has been lost. In other cases a scire facias may be necessary to ascertain what is 936, to be restored. 2 Salk. 587, 588; Tidd's Pract. 1137, 1138. And nodoubt *circumstances may exist where an action may be sustained to recover back the money.*" We are of opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties, the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction.

WHAT DID DISMISSED WITHOUT PERJUDICE MEAN?

It is to be noted that in the injunction case in the U. S. Circuit Court at Kansas City, brought by defendant and other railroads to restrain the enforcement of the rate laws, the decree of the court was reversed and the bills ordered dismissed as to *eleven* of the railroads (of which the defendant was one), and the decree was affirmed as to other of said railroads. As to the bills ordered dismissed, the decree was to be "without prejudice." Likewise *in the cases affirmed the decree was without prejudice.* True the latter decree did not use the term "without prejudice," but it did say, "*the decree in these three cases will accordingly be affirmed with the modification that the Railroad & Warehouse Commissioners and the Attorney-General of the state may apply at any time to the court by bill or otherwise, as they may be advised, for further orders and decrees whenever it shall appear that by reason of change in circumstances the rates fixed by the state act are sufficient to yield these companies reasonable compensation for the services rendered.*" (Missouri Rate Cases, 230 U. S. l. c. 474.)

We desire to call this court's special attention to this decree. We insist that the United State Supreme Court is an impartial tribunal, and that it was not intended by this court that the railroads could again litigate the confiscatory character of said rates (as to the period during which the injunction was pending), and that the state could not. Plainly the state could not go into court and again sue either of the *three* railroads, mentioned in that part of the decree just quoted, to recover overcharges during the period covered by the injunction, and seek to make a showing of facts, during that period, different from those shown in the injunction suit, and thereby obtain a recovery. But as to the future, upon a showing that the rate statutes are compensatory, it might maintain such a suit. This is the plain meaning of the decree as to the cases in which the decree was affirmed.

An examination of the opinion in the *Missouri Rate Case*, 230 *U. S.*, discloses that *the cases were disposed of upon a consideration of the evidence* and *that the bills that were dismissed, as to eleven railroads, were not dismissed upon a technicality but because the evidence* did *not show the rates to be confiscatory.*

Defendant insists that when sued for overcharges, exacted in excess of a Statute rate, which the Supreme Court did not find confiscatory, it can go again all over the question of the confiscatory character of said rates, simply because the court dismissed the bills "without prejudice." If that contention be true, it convicts the highest court in our land of denying to the shippers and passengers of the State of Missouri a right accorded to the railroads of this state; of leaving the question open when urged by the railroads, while it shuts the door of opportunity and forecloses the question when urged by shippers and passengers against the railroads; of permitting the complainants in the rate injunction suits to obtain an unconscionable advantage of the shippers and passengers, of which this complainant is one; and of taking away the rights of said shippers and passengers and arbitrarily conferring them upon this defendant and other railroads.

We do not believe that the Supreme Court intended any such result when it added the words "without prejudice" to its decree dismissing the bills in the rate cases. We think the plain meaning of that decree is that the question of the confiscatory character of the rates is still open as to the future, "whenever it shall appear that by reason of change in circumstances" that the rates are confiscatory (as to the eleven railroads) or compensatory (as to the other six); but that as to charges exacted during the pendency of the injunction, the question is forever foreclosed as to all parties.

In the Missouri Rate Cases, 230 U. S., p. 474, L. ed. Vol. 57, p. 1571, the United States Supreme Court said:

> "We can reach no different conclusion from that stated in the decisions to which we have referred, that in an issue of this kind, involving the constitutional validity of the state's action, general estimates of the sort here submitted with respect to a subject so intricate and important should not be accepted as adequate proof to sustain a finding of confiscation. Simpson v. Shepard, supra. For the reasons that have been set forth we must conclude that save in the cases mentioned below the complainants failed to sustain their bill."

The court continues, as to some of the excepted cases as follows:

> "The decree in these three cases will accordingly be affirmed with the modification that the Railroad & Warehouse Commissioners and the Attorney-General of the State may apply at any time to the court, by bill or otherwise, as they may be advised, for further orders and decrees *whenever it shall appear that by reason of change in circumstances* the rates fixed by the state act are sufficient to yield these companies reasonable compensation for the services rendered."

The court further observed:

> "The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and each complainant, in order to succeed in assailing them, must show that as to it the rates are confiscatory."

And the court further ordered in that case, that the cases in which the judgment of the lower court was reversed were to be remanded with directions to *dismiss* the bills respectively "without prejudice."

This meant, and could only mean, that not only had the court found the statutes fair on their face, but it also found that their application to the defendants for the years from 1905 to 1914 was a constitutional application of that rate.

"Dismissed without prejudice" simply meant that if in the future conditions so changed that the defendant could show for a period of time subsequent to the decree that the rates did not provide a sufficient income, the defendant would then have an opportunity to appeal to the court for a suspension as to it of the application of the statutes for that period of time. But so far as the period of time between 1905 and 1914, involved in this case, the question of the reasonableness of the rate and its proper application to the defendant companies had been forever foreclosed.

In Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, a somewhat similar situation was presented, and clearly shows what the court meant in the Rates Cases by the word "without prejudice." The court there said:

> "If hereafter it shall appear, under the actual operation of the ordinance that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or the courts of Tennessee."

> "As the case now stands, there is no such certainty that the rates prescribed will necessarily have the effect of denying the company such a return as would avoid confiscation. For these reasons the decree is reversed and the case remanded to the court below with directions to dismiss the bill without prejudice."

In Willcox v. Consolidated Gas Co., 212 U. S. 19, 53, L. Ed. 382, the court said:

> "It may possibly be, however, that a practical experience of the effect of the act, by actual operation under them, might prevent the complainant from obtaining a fair return as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill, without prejudice. It is so ordered."

In the case of Des Moines Gas Co. v. City of Des Moines, U. S., Adv. Ops. 1914 (Aug. 1, 1915), p. 811, the court again said:

> "We think this is particularly so in view of the fact that ordinarily, time alone can demonstrate in a case like this whether or not the rates as established will prove to be so unremunerative as to be confiscatory in the sense in which that term has been defined in the rate-making cases. With that modification that the bill be dismissed without prejudice, instead of, as the court below directed, with prejudice, the decree is affirmed with costs."

If it had been the idea of the Supreme Court that the defendant railroad company should have another opportunity to present proof as to the constitutional application of that rate between the years 1905 to 1914, it would have '*reversed*

the case without prejudice' and so indicated to the trial court that it was its desire to have further evidence adduced in order that they might determine that question.

This was the language used in case of *In re City of Louisville*, 231 U. S. 639; 58 L. ed. 413. Instead, the mandate here was to *dismiss* the case. The court had passed upon the application of those statutes to defendant for the years 1905 to 1914. The court desired no further evidence as to that period of time. The defendant had had its "day in court" as to those years. The bill was to be dismissed, but with nothing attached to the order to prevent another application after the actual operation of the statute to relieve defendant of its application for that subsequent period of time.

That this decision had settled this particular question was also the view of the railroad company when it appeared before Judge McPherson in the Western District and asked him to enter the final decree in the cause.

In St. Louis & San Francisco R. R. Co. v. Barker, 210 Fed. 912, appears the following:

> "The other 13 companies from the time of final decrees herein until the 1st of July last did charge in excess of 2 cents per mile per passenger, and did charge for intrastate freight more than the statute allowed. And the only question now presented is as to what shall be done by way of procedure for the recovery back of such excess passenger rates and freight rates during the time the state statutes were not observed."

Again, on page 917 of same opinion, it is said:

> "The railway company insists that by the appointment of a master these moneys and the rightful claimants could be ascertained and payment made within a few months."

Again, on page 918, it is said:

> "And for that purpose a master will be appointed, but those claimants who do not thus elect to come into this court will not be bound so to do by any order of this court. They are left free to go to such courts as they may select."

In this case not only was the constitutionality of the statute conceded, but that it was constitutionally applied to the defendant for the years between 1905 and 1914 was also conceded.

To permit defendants to assert title to money or property exacted and obtained from it while it was restrained by a wrongful injunction and decree of the court since reversed, would be to overturn the very foundation principles of equity, and make an equity court and its processes and decrees engines of wrong and oppression, instead of instruments toward justice and right.

In Sec. 343, 1 *Beach on Injunctions*, 348, it is said:

> "Where the act sought to be enjoined is done before the complainant's bill is filed, and he knows it is already done, a preliminary injunction issued to prevent the act is improvident and will properly be dissolved on the hearing, and *if plaintiff in such a case has obtained an advantage by acting when his opponent's hands are tied, he will be compelled to relinquish it*, so that the original status may be restored."

The same rule is laid down in *Joyce on Injunctions*, Vol. 1, Sec. 343.

In *Railway Co. v. Taylor*, 134 Ill. 603, it is said:

> "And so it must necessarily follow that *to allow one party to obtain an advantage by acting when the hands of the adverse party are thus tied by the writ or order for it, is an abuse of legal process which can not be tolerated.* It is immaterial here in whom is the legal title; those questions can not be determined here It is sufficient, for the present, that appellee, after having tied the hands of appellant as to the assertion of its claim of right, and while they were so tied, has changed the *status quo* of the parties in this respect. *She must restore things to the same plight and condition, as nearly as possible in which they were when the judge made the order upon her bill that an injunction issue.*"

In *Love v. North American Company* et al., decided December 4, 1915, by the U. S. Circuit Court of Appeals for the Eighth Circuit, a suit for overcharges and incidental to the receivership of the St. L. & S. F. R. R. C., the court said:

> "There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity that has taken over the business of a public carrier by means of a receivership ought to be equally careful to enforce."

The unconscionable advantages that were obtained by defendant, by virtue of the wrongful injunction, obtained

through the United States Circuit Court at Kansas City, are plainly apparent. But for that injunction, the money which complainant seeks to recover would still be in its treasury. But for that injunction, it would never have been deprived of or lost its property. But for that injunction, it would not now be met with the plea of the statute of limitations, but, on the contrary, might have pleaded it itself, if it had been sued to recover back the difference between what it had paid and what was compensatory, if the statutory rates had been held invalid. But for that injunction, no money would have been obtained from complainant, and it would not now be here seeking redress.

Having failed in its suit to strike down the rate statutes, and having obtained the money of complainant by virtue of its own voluntary wrong by exacting charges in excess of a statutory rate that stands valid to this day, will a court of equity permit defendant railroad company to retain the fruits of its own wrong while it again attempts to litigate the validity of said statutes? What could be more unconscionable? What more subversive of the basic principles of equity?

II.

Where a carrier alleges a rate to be confiscatory it may litigate the question by enjoining the representatives of the State. It cannot litigate the question against individuals. This would be a collateral attack, and as a direct method is provided that method is exclusive.

A carrier should never have the right in this country to litigate the question of confiscation with each shipper or passenger. Such a proceeding would be ruinous. The courts would be clogged with a great number of suits and a finding for or against the carrier with one shipper would not be binding on the other; so that the rule has been well established in the last few years that if a carrier desires to litigate the question of confiscation it must do so with the governmental authorities. In this case the railroads litigated this question

with the officers of the State and when the bill was dismissed below upon order of this court, the railroad put the statutory rates into effect and thus acquiesced in the ruling of this court, and the railroads cannot now deny and defy the decisions of this court.

In the case of In re Englehard & Sons Co., petitioners, 231 U. S. 646, 58 L. Ed. 416, this court, in passing upon this identical question, at page 418, laid down the rule above contended for in language which cannot be misunderstood, when it said:

> "*It is the universal practice sustained by authorities that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them, or is charged with the duty of enforcing them.*"

In the case of Chicago, M. & St. P. Ry. v. Minn., 134 U. S. 418, 33 L. Ed. 970, Mr. Justice Miller again reiterated and reaffirmed this doctrine that a carrier cannot litigate questions of confiscation against a shipper or passenger. He said:

> "That until this is done (a decision in equity in which the public was represented) it is not competent for each individual who has dealings with the carrying corporation, *or for the corporation with regard to each individual who demands its services, to raise a contest over the question which ought to be settled in this general and conclusive method.*"

These cases are decisive of this question. This railroad sought relief in a court of equity when it attempted to prove confiscation, but the relief was denied. Now it is seeking relief in a court of law after having been denied such relief in a court of equity.

The State of Missouri expended over $100,000.00 in sustaining the constitutionality of the maximum passenger

and freight rate laws. During the fight the railroads collected the higher rates. Can this question again be litigated for seven years more, and if so, and the railroads then fail, as they did before, will they then have seven years more; and if so, when will this litigation end? This railroad had its day in court and failed to prove that these rates were confiscatory. This matter is certainly at an end.

Suppose the interstate commerce commission makes a rate on flour between St. Paul and St. Louis. The carrier arbitrarily charges the shipper twice as much as the rate established by the interstate commerce commission. In a suit by the shipper to recover this excess charge, can the railroad litigate with the shipper the question of confiscation with reference to this rate, or must not the carrier apply for an increase, if desired, to the interstate commerce commission and then on through the courts?

CONCLUSION.

This court held that some of the Missouri railroads had proven that the Missouri rates were confiscatory, but as to this defendant railroad the court held that it had wholly failed to prove such rates confiscatory; therefore, this railroad is precluded from again litigating this question. As to the railroads which the court held had proven the rates confiscatory, no shipper could sue those railroads now for money paid during this injunction and again litigate with them the question of confiscation. No one would so contend. That as to those years is closed. Then it must be held that if those matters could not be relitigated, then this railroad cannot again relitigate the question of confiscation. As to future years, this question can be litigated.

So that it is exceedingly important that this court carefully look into this plea of confiscation and strike the same out if the position of the State is right, because if not done it will prohibit all shippers and passengers from recovering overcharges in Missouri because they cannot afford to again litigate this question of confiscation. Missouri per-

haps expended over $100,000 in litigating this question with this and other railroads, and as this railroad had its day in court in an attempt to show such rates were confiscatory, and failed to do so, we claim that the matter is ended.

It is therefore the duty of this court to strike out this plea of confiscation and sustain the motion of the complainant.

Respectfully submitted,

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Original No. 16.

In the

Supreme Court of the United States

October Term, 1915.

STATE OF MISSOURI, *Complainant*,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Defendant*.

APPENDIX TO DEFENDANT'S BRIEF OF ITS ORAL ARGUMENT UPON COMPLAINANT'S MOTION TO STRIKE, CONTAINING LOCAL STATUTORY PROVISIONS REFERRED TO THEREIN.

O. M. SPENCER,
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Revised Statutes Missouri, 1909.

"Sec. 3187. SCHEDULE OF MAXIMUM RATES POSTED IN DEPOTS—DUTY OF COMMISSIONERS. Every such common carrier shall print and keep for public inspection schedules showing the rates for freight which such carrier has established

and which are in force at the time upon the railroad or railroads operated by it as defined in Section 3179. Said rates shall be reasonable and just, and shall not in any case exceed the maximum rates which are or which may hereafter be established by law. Schedules as aforesaid shall contain the classifications of freight in force upon such railroad or railroads, and if there be any rules or regulations which change, determine or affect any part of the aggregate of such rates, fares and charges, such rules and regulations shall accompany such schedule. Copies of such schedules, also such rules and regulations, if any, shall be kept posted in every depot or station upon any such road in such place where the same can be conveniently inspected by every person interested in the same. Copies of such schedules, also such rules and regulations, if any, shall be filed with the railroad commissioners of the state of Missouri, and from the date of such filing, the rates, fares and charges specified in such schedule, not being in excess of any statutory maximum rates now or that may hereafter be in force, shall be deemed the established rates, fares and charges of such common carrier until the same is changed as in Sections 3179 to 3207, inclusive, provided. No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any such common carrier in compliance with the requirements of said sections, except aften ten days' public notice which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares and

charges will go into effect; and the proposed changes shall be plainly indicated upon the schedules in force at the time, and kept for public inspection in like manner as herein provided. Reductions in such published rates, fares and charges may be made without previous public notice, but whenever any such reduction is made, notice of the same shall be immediately publicly posted, and the changes made shall be immediately plainly indicated upon the schedules in force at the time and kept for public inspection, and copies of the schedules containing such changes shall be forthwith filed with said railroad commissioners. Such changed schedules shall become the established schedules from the date of such public notice until changed as herein provided for changing schedules of rates, fares and charges. When any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of said sections, the same not being in excess of any statutory maximum rates now or that may be hereafter in force, it shall be unlawful for any such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of property or for any service in connection therewith than is specified in such published schedule of rates, fares and charges as may at the time be in force, except as herein may be specifically permitted. It shall be the duty of the railroad commissioners to see that all schedules of rates prepared and adopted by common carriers are reasonable and just, and they may, upon complaint

of any person, or upon their own motion and without complaint, make inquiry from time to time, and determine whether the schedule of rates prepared and adopted by any such common carrier is reasonable and just." (R. S., 1899. Sec. 1136.)

"Sec. 3189. COMMISSIONERS TO ENFORCE RATES, MAKE SCHEDULES—WHEN.—It shall be the duty of said railroad commissioners to see that such schedules of joint rates, fares and charges are reasonable and just, and that such schedules of joint rates, fares and charges shall be observed by all the common carriers who are parties to the same. But no such common carrier, party to any such joint tariff, shall be liable for the failure of any other such common carrier, party thereto, to observe and adhere to the rates, fares and charges as made and published. If any such common carrier shall neglect or refuse, for a period of thirty days, to file or publish its schedules of rates, fares and charges, as provided for in Sections 3179 to 3207, inclusive, or any part of the same, it shall be the duty of said railroad commissioners to make out and print a schedule or schedules of reasonable rates for such common carrier, and deliver copy or copies of the same to such common carrier. Such delivery shall be by messenger, by registered letter or by any sheriff in this state. It shall be the duty of every sheriff to serve and deliver the same whenever directed thereto by an order of said board of railroad commissioners, and shall return the same

in like manner and with like effect to said board as in case of summons in civil suits. Such common carriers for whom such schedules shall be made by said board shall keep the same posted in their depots and stations, as required in said sections for schedules made out by them in compliance with law; and the provisions of said sections concerning the schedules required to be made by such commissioners, and the changing thereof, shall apply to the schedules made by said board as provided in this section. The costs of preparing, printing and delivering said schedules shall be paid by such common carrier, and shall be specified in an order of said board entered of record, and a copy of said order, certified by the secretary of said board, shall in any suit be *prima facie* evidence of the amount which ought to be paid, and may be recovered in an action in the name of the state, at the relation of said board, before any court or justice of the peace in this state having jurisdiction of the amount thereof. A copy of such schedules so made by said board, certified by the secretary of said board shall, in proceedings wherein is involved the reasonableness and justness of the charges and rates of such commissioners, be *prima facie* evidence that rates therein fixed are reasonable and just." (R. S., 1899, Sec. 1138.)

"Sec. 3194. COMMISSIONERS TO SEE TO ENFORCEMENT OF ARTICLE — INVESTIGATE COMPLAINTS.—It shall be the duty of the railroad commissioners of this state to see that the pro-

visions of Sections 3179 to 3207, inclusive, are enforced. When complaint is made in writing by any person having an interest in the matter about which complaint is made, that any rate or rates established by any common carrier are unreasonable, unjust or extortionate, or that any of the provisions of said sections have been or are being violated, it shall be the duty of said railroad commissioners to proceed at once to investigate such complaint and determine the truth of the same, and for that purpose said railroad commissioners shall have power to summon witnesses and to require the production of any necessary books, papers or written documents in possession of the common carrier complained of, and to this end written or printed communications, signed by any one of such railroad commissioners and attested by the secretary of such commission, under seal and sent by registered letter through the mail or delivered personally to the person addressed, shall be deemed a sufficient service. Witnesses so summoned by said commissioners shall be entitled to the same fees as are allowed in Circuit Court in civil cases. In case of the failure or refusal of any person or persons so summoned to attend and testify at the time and place specified in said summons, or to produce any designated books, papers or documents required or called for as provided for in this section, such person or persons failing shall be deemed guilty of contempt, and said railroad commissioners shall have power to impose such penalties as the Circuit Court of this state may impose for like offenses; and if any com-

mon carrier, or any officer, agent or servant thereof, shall wilfully or knowingly obstruct or prevent said railroad commissioners from making such investigations as are authorized by said sections, they shall be deemed guilty of a misdemeanor, and on conviction thereof may be punished by fine not exceeding five hundred dollars. For the purpose of conducting such examination, such railroad commissioners, or any of them, shall have the power to administer oaths or affirmations, and they shall prescribe such rules and regulations for the conduct of such investigation as they may deem best to enable them to arrive at the facts, but in every case a full and fair hearing shall be accorded to all parties having an interest in such case. Such railroad commissioners may institute any inquiry, on their own motion, in the same manner and to the same effect as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant." (R. S., 1899, Sec. 1143.)

"Sec. 3195. FORFEITURES, HOW RECOVERED AND DISPOSED OF.—The forfeitures and penalties herein provided for shall go to the county school fund of the county where sued for, and may be recovered in a civil action in the name of the state of Missouri, at the relation of the board of railroad commissioners to the use of said fund, in any county where the complainant resides, if in the state, and if not, then where the offense may occur, or into or through which the railroad oper-

ated by the common carrier offending, or on which it operates, may run. It shall be the duty of the circuit or prosecuting attorney, and such additional counsel residing in such county as said board may employ, to prosecute the same when directed by said board, and the attorneys prosecuting such suit shall receive for their services, out of the amount collected by the suit, the compensation allowed by law for collections made on forfeited recognizances. The Attorney General shall assist in the prosecution when directed by the board of railroad commissioners. And all suits instituted under the provisions of said Sections 3179 to 3207 shall have precedence in all courts having jurisdiction thereof, over all other suits therein except criminal actions. (R. S. 1899, Sec. 1144.)"

"Sec. 3196. FINDING OF COMMISSIONERS—ORDER—ATTORNEY-GENERAL MAY PROSECUTE ON.—Said railroad commissioners shall render a decision in every case investigated in accordance with the facts thereby ascertained, and which shall embrace a summary statement of such facts. In case that said railroad commissioners shall find in any case that such common carrier has been guilty of any violation of said Sections 3179 to 3207, they shall incorporate such finding in said decision, and also an order to such common carrier to desist immediately from such violation. In case they shall find that any injury or damage to any person or persons making complaint as afore-

said has accrued by reason of such violation, they shall award the amount thereof, and incorporate in their decision a statement thereof, and the names of the person or persons so damaged, together with an order to such common carrier to pay the same to such person by date to be therein specified. In case that any such decision shall be against any such common carrier, it shall pay all costs of the investigation, which costs shall be specified in the decision of the said commissioners, together with an order to pay to them immediately the amount thereof. A copy of such decision, signed by the commissioners and attested by their secretary, and sealed with their seal, shall be furnished to each party in interest, either personally, by registered letter, or in such other manner as the commissioners may deem sufficient. Said commissioners shall make and preserve a record of all proceedings in every investigation, and of their decision therein, which shall be a public record, and open to the inspection of any citizen of this state. And if any such common carrier shall fail or refuse to pay the amount adjudged to be due, on or before the day specified aforesaid, said commissioners may, at their own instance, and shall when requested by the person or persons injured or damaged, cause the Attorney-General or the prosecuting attorney of the proper county to institute suit against such common carrier in the name of the state of Missouri at the relation and to the use of the party injured or damaged, to enforce the payment thereof, together with costs; and upon the trial of such cause a certified copy of the award and decision of said commissioners

shall be received as *prima facie* evidence of each and every fact therein stated; and provided, however, that the person or persons to whom such damages are due may institute suit for same in his own name. In the result of such examination to be in favor of such common carrier, the amount of such costs shall be by the commissioners certified to the state auditor, who shall issue a warrant for the payment thereof, out of any money in the state treasury appropriated for that purpose. (R. S. 1899, Sec. 1145.)"

"Sec. 3193. PENALTY BY FORFEITURE FOR VIOLATION OF ACT.—Any such common carrier in Section 3179 described, or any of its officers, agents or employees, including receivers, trustees and lessees, who alone, or with any other person, company or corporation, shall do or cause to be done, or shall permit to be done, any act, matter or thing in Sections 3179 to 3207, inclusive, prohibited, or declared to be unlawful, or shall aid or abet therein, or fail to do any act or thing in said sections required to be done, or shall cause any act or thing not to be done, which said sections direct shall be done, or shall aid or abet in any such omission, shall be deemed guilty of a violation of the law, and shall forfeit a sum not exceeding five thousand dollars for each and every offense. (R. S. 1899, Sec. 1142.)"

"Sec. 3201. PROCEEDINGS WHEN ORDER OF COMMISSIONERS IS DISOBEYED—CIRCUIT COURT —ENFORCE OR RENEW ORDER—PROCEEDINGS.— Where the complaint involves either a private or public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employee thereof, shall violate, refuse or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any circuit court at any county in this state into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable. And such notice may be served on such common carrier, its officers, agents or servants in such manner as the court may direct; and said court shall proceed to hear and determine the matter speedily in such manner as to do justice in the premises; and to this end said court shall have power, if it thinks fit, to direct, and prosecute in such mode and by such persons as it may appoint, all such inquiries as may seem needful to enable it to form a just judgment in the matter of such petition. On such hearing the report of said commissioners shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to the court on such hearing, or on

report of such persons appointed as aforesaid, that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. If such court shall hold and decide that any order of said board of railroad commissioners involved in such proceeding was not a lawful order, said court shall, without any reference to the regularity or legality of the proceedings of said board, or of the order thereof, proceed to make such order as the said board should have made, and to enforce said order by the process of said court, and to enforce and collect the forfeitures and penalties herein provided in all respects according to the provisions of said Sections 3179 to 3207. And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachments, or other proper process of said court, incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and if a corporation against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or

other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. When the subject in dispute shall be of the value of one hundred dollars or more, either party to such proceeding before such court may appeal to the proper appellate court in this state, in the same manner that appeals are taken from such courts in this state in other proceedings involving like sums of money; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless stay of proceedings be ordered by the court from which the appeal is taken, or by the appellate court to which the appeal is taken, upon the application of the appealing party. Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney general, when requested by said commissioners, to prosecute the same. All proceedings commenced upon such petition shall, upon application of the petitioner, be advanced upon the docket and take precedence of any other case

upon the docket except criminal cases. The costs of such proceedings may be, with the approval of the attorney general and governor of the state, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case. (R. S. 1899, Sec. 1150.)"

"Sec. 3205. COMMISSIONERS LIABLE TO MANDAMUS AND FINE.—In case that the railroad commissioners shall fail or refuse to perform any act or duty required of them by said Sections 3179 to 3207, they shall be liable to proceedings in mandamus to compel the performance of such act or duty, and in addition thereto, shall be liable to such fine as the court may impose, not exceeding five hundred dollars. A majority of the railroad commissioners shall constitute a quorum to do business and any act or decision of any two of them shall be taken as the act or decision of the commissioners. (R. S. 1899, Sec. 1154.)"

"Sec. 3231. ROADS CLASSIFIED.—All railroads in the state of Missouri are hereby divided into

four classes, to be known as class A, class B, class C and class D. Class A shall include all through or trunk line railroads and all branch roads owned, leased, controlled or occupied by such through or trunk line railroad companies or corporations. Class B shall include all other railroads or parts of railroads owned, leased, controlled or occupied or which may hereafter be owned, leased, controlled or occupied either wholly or in part, by any trunk line company or corporation. Class C shall include all other railroads of a greater length than forty-five miles. Class D shall include all roads less than forty-five miles in length not owned, leased, controlled or occupied by any trunk line company or corporation. (R. S. 1899, Sec. 1191, amended, Laws 1907, p. 171.)"

"Sec. 3232. PASSENGER CHARGES REGULATED. —Any individual, company or corporation owning, operating, controlling or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile, for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In classes A, B and C, not exceeding two cents per mile, and in class D, not exceeding four cents per mile: *Provided*, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half of the rate above

prescribed; *and provided further*, that the rates for transportation herein prescribed may be reduced, as hereinafter provided. (R. S. 1899, Sec. 1192, amended, Laws 1907, p. 171.)"

"Sec. 3233. PENALTY.—Any individual, company or corporation, or any agent or officer thereof, who shall violate any of the provisions of Section 3232, shall be deemed guilty of a misdemeanor, and upon conviction, shall pay a fine of not less than one hundred nor more than five hundred dollars. (Laws 1907, p. 171.)"

"Sec. 3248. PENALTY FOR ILLEGAL CHARGES, ETC.—In no instance shall any such individual, company or corporation, lessee or other person, charge or receive any greater rate of compensation for carrying freight or passengers than hereinbefore provided, and any individual, company or corporation violating, or in any way evading the provisions of this article, shall forfeit all right to recover or receive any compensation whatever for the service rendered wherein such violation is attempted; and every agent of any such corporation, lessee, or other individual operating any railroad within this state, who shall refuse to receive for transportation over the road for which he is agent, in the usual way, any of the articles hereinbefore mentioned, on account of the compensation hereinbefore prescribed being too low, or receiving any such articles of freight, shall charge

or attempt to charge for the transportation of the same, any greater sum than herein fixed, or shall in any manner violate or attempt to violate or evade the provisions of this article, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall pay a fine of not exceeding two hundred dollars for each and every offense, and the injured party shall have a right of action against said agent, or against the railroad company, or other persons operating the railroad, or both, in which case he shall be entitled to recover three times the amount taken or received from him in excess of the rate prescribed by this article. (R. S. 1899, Section 1196.)"

"Sec. 3252. COMPANIES TO FURNISH RAILROAD COMMISSIONERS WITH SCHEDULES OF FREIGHT CHARGES—POWERS OF COMMISSIONERS.—All railroad companies doing business in this state shall, upon the request of the Board of Railroad and Warehouse Commissioners, furnish to said board copies of all its schedules of freight rates and charges, and all other papers and documents, including bills of lading and contracts for transportation of freight affecting in any way the transportation of freight within, into and from this state. And said board shall have full power and authority to examine all officers, agents and employees of said railroad companies, and all other persons, under oath or otherwise, to procure the necessary information to make just and reasonable freight rates or charges, and to ascer-

tain if the freight rates so fixed by said board are being observed or violated. And said board shall have power to administer oaths, to issue subpoenas for persons and papers, examine witnesses and to enforce the same in like manner as the Circuit Courts of this state. And in the issuance and enforcement of the papers and process above, the jurisdiction shall be co-extensive with the state. (Laws 1903, p. 132.)"

"Sec. 3253. COMMISSIONERS TO ENFORCE REASONABLE RATES.—It is hereby made the duty of the railroad commissioners to exercise constant diligence in informing themselves of the rates and charges of common carriers engaged in the transportation of freight from points in this state to points beyond its limits, and from points in other states to points in this state; and whenever it shall come to the knowledge of the railroad commissioners, by complaint made to them or in any other manner, that the rates charged by any such common carrier on interstate business are unjust, excessive or unreasonable, or that such rates discriminate against the citizens of this state, the commissioners shall cause the facts thereof to be embodied in a complaint setting forth, in detail, the respect in which the rate complained of is unjust, excessive or unreasonable, and shall file said complaint with the Interstate Commerce Commission and demand a hearing thereof, and shall thereafter furnish testimony in support thereof, and diligently present the

facts upon which such complaint is based. At the time of filing such complaint, the railroad commissioners shall give notice thereof to the attorney general, who shall prosecute the same to final determination before the said Interstate Commerce Commission. (R. S., 1899, Sec. 1199.)"

Respectfully submitted,

O. M. SPENCER,
FRANK HAGERMAN,
Solicitors for Defendant.

CHESTER M. DAWES,
Of Counsel.

Office Supreme Court, U. S.
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operating a railroad in that State, obtained, in 1909, in the United States Circuit Court for the Western District thereof, an injunctive decree against its enforcement, because confiscatory, which, upon appeal, was here (230 U. S., 474) reversed and a decree of dismissal, *without* prejudice, directed; an injunction bond of $10,000 was given in the cause, which, though on its face secured "all *damages* * * * sustained by defendants," was, in fact, only a cost bond; pending the injunction from 1907 to 1914, State officers, employes and agents traveled on defendant's road and paid in excess of the statutory rate, $1,412.37, for which a recovery by the State is now sought.

(b) Answer.

The answer specifically and separately denied *every* material allegation of the bill, including the averments that the State paid or was entitled to recover any excess fare, or that the injunction bond was merely for costs. It also alleged not only that the State statutes forbade any recovery, but that the right of action, if any ever existed, was barred by limitation. Paragraph 10 (at which *alone* the motion to strike is leveled) set forth as an independent defense that the two-cent fare statute was confiscatory upon the two *distinct* and *separate* grounds that it, *first*, did not permit defendant to earn a fair return on the value of the property devoted to the service, and *second*, did not even provide a sufficient sum with which to pay the cost of the transportation.

The reasons for the motion to strike are practically that (1) the decision here (230 U. S., 474) settled for all time and *finally* decided that the statutory rate was not confiscatory, and (2) even if it were, that fact is not any defense to an action by the State for overcharges.

ARGUMENT.

I.

The motion erroneously assumes that the question of confiscation was here (230 U. S., 474) settled and upon its merits finally adjudicated.

(*a*) This preliminary question should be decided upon the face of the pleadings. Nothing more than a mere reference thereto is necessary to determine it.

The answer puts the averments of the bill at issue, and after conceding the dismissal of the injunction suits concludes:

> "All the pleadings, orders and decrees in said causes are of record in this court on appeals from the *nisi prius* court; the defendant prays leave to refer to same as if fully set out herein (*but same, if necessary, will be set out*), without further pleading their contents, as they will not only disclose that the facts are not correctly alleged in the bill, but that complainant has no cause of action whatsoever."

The decrees were thus, by reference, made part of the answer, and nothing appears to show that the question of confiscation was ever *settled, determined or finally decided.* On the contrary, they show that the dismissal was without prejudice.

(*b*) If, however, the question is, as counsel in their brief assume, to be decided by a reference to the opinion (230 U. S., 474, 509) here, then, as a matter of fact, there was never, as alleged, *any* writ of error nor any *decree* here, let alone one upon the merits or one dissolving the injunction. The language of the opinion that "the decrees * * * are reversed and the cases *remanded with directions to dismiss*

the bills respectively without prejudice." The mandate, of course, followed the opinion, and the lower court did not disobey it. The decree below, entered pursuant thereto, by reference now made part of the answer, can by amendment, if deemed necessary, be, as the answer offers to do, set out *in hæc verba*, so as to absolutely show what already appears, that there was no adjudication upon the merits.

(*c*) This much has been said to dispose of the erroneous thought of counsel that the question of confiscation ever became *res adjudicata*. A dismissal *without prejudice* means that the issues can be again litigated "as if no previous suit had been commenced." (*Northern Pacific R. Co.* v. *St. P. M. & M. R. Co.*, 47 Fed. Rep., 536; *Mobile* v. *Kimball*, 102 U. S., 691, 26 L. Ed., 238; *Averill Machinery Co.* v. *Allbritton*, 51 Wash., 30, 97 Pac. Rep., 1082; Whitehouse on Equity Practice, sec. 395.)

II.

If, as the answer alleges, the two-cent statutory fare requirement was confiscatory, then complainant cannot recover, and any defense which so shows is, of course, proper.

(*a*) The matter stricken at is the plea that the two-cent statutory rate was confiscatory for the two *separate* and *distinct* reasons that it, *first*, prevented defendant from earning a fair return upon the value of the entire property devoted to the use, and *second*, actually required the defendant to carry passengers at a less rate than the transportation actually *cost*. The two ideas are distinct and separate. If the statute did not permit the defendant to earn a fair return upon the value of its property in the State devoted to the use, then it was confiscatory and not binding upon defendant. (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819; *Norfolk & W. R. Co.* v. *Conley*, 236 U. S., 605, 59 L. Ed., 745.) Moreover, if

that return was so meager that it was insufficient to pay for the *cost* of that particular service, the statute was for that reason void. (*Southern R. Co.* v. *St. L. Hay & Grain Co.*, 214 U. S., 297, 310, 53 L. Ed., 1004, 1006; *Northern Pac. R. Co.* v. *North Dakota*, 236 U. S., 585, 59 L. Ed., 735.) If, then, for either of these *two* reasons the State statute was unconstitutional, there is a perfect defense, for in that event there was no wrongful act committed nor illegal overcharge made. This because an unconstitutional statute is no law.

(*b*) The claim of the State here is presented by a bill in equity. In the caption, body, prayer, and verification it styles itself "complainant," calls its statement of its alleged cause of action a "bill of complaint," waives "an answer under oath," and besides a money judgment "complainant prays * * * for such other and further relief general and special as in the premises may seem meet." Had the bill been filed in the District Court in the proceedings out of which the claim arises, instead of here (*Krippendorf* v. *Hyde*, 110 U. S., 276, 280-282; 28 L. Ed., 145; *Root* v. *Woolworth*, 150 U. S., 401, 411, 413; 37 L. Ed., 1123), it would have borne every earmark of the familiar ancillary and dependent bill in equity. If the bill is correctly framed in equity and a consideration of the question of confiscation is limited to that forum, then the defense is proper because Equity Rule 30 expressly permits a defendant to "state as *many* defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense."

(*c*) If, however, regardless of the *aim* of the pleader, the alleged bill be construed as a simple petition at law, the same result follows. The statute of Missouri (Rev. Sts. Mo., 1909, sec. 1806), where the alleged cause of action arose, should, by analogy, be here applied in cases at law. Anyhow, it expresses the modern thought. It expressly permits an answer to contain "any new matter constituting a defense or counter-claim," by providing:

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 16, Original.

STATE OF MISSOURI, COMPLAINANT,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, DEFENDANT.

BRIEF OF DEFENDANT OF ITS ORAL ARGUMENT UPON COMPLAINANT'S MOTION TO STRIKE.

STATEMENT.

1. The question presented.

This is an *original* bill in equity by a State to recover from a railroad alleged excesses in fares above the statutory two-cent passenger rate paid *by its officers* between June, 1907, and January, 1909. An answer has been filed specifically *denying* every material allegation made. In addition thereto it set up some distinct and separate defenses.

One of these is that the alleged statutory rate was confiscatory, not only because it prevented a reasonable return upon the value of the property devoted to the service, but *also* because it was insufficient to even pay the actual *cost* of the passenger transportation. The State has filed a motion to strike out this *particular* defense, and that *alone* is the matter to be now considered. Counsel, however, ignoring this question, undertake to present the merits of their case, not as it *is*, but *only* as it is *alleged* in the bill, every material allegation of which is, by denials, distinctly put at issue. Upon the motion, which *must* deal solely with the pleadings as they *are*, the *only* question which can arise is this: In a suit, by a State (itself not amenable to an action by a carrier), to recover the portion of passenger fares charged it in excess of a two-cent statutory rate, can that carrier make the defense that the rate was confiscatory in that it did not allow a *fair* return upon the *reasonable value* of the property devoted to the use, nor even a sum sufficient to cover the *actual cost of the service?* Such a question, thus plainly, though bluntly, stated, really argues itself and should, without more, result in a denial of the motion.

2. The pleadings.

That the question as thus stated is the *only* one here involved plainly appears from this slight analysis of the pleadings:

(a) Bill.

The facts pleaded in the bill, eliminating the needless and confusing averments as to freight rates, are these: In 1907, Missouri adopted (Laws Mo. 1907, p. 170) a statutory two-cent railroad fare rate, making *each* violation thereof a misdemeanor punishable with a fine of not more than $500, nor less than $100; while that law was in force the defendant,

"The answer of the defendant shall contain: First, a general or specific denial of each material allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief; *Provided*, that it shall be competent for the defendant to unite a general and specific denial in the same answer; second, a statement of any *new matter* constituting a defense or counter-claim, in ordinary and concise language, without repetition."

(*d*) That a railroad company can, by its own *original* bill in *equity*, have injunctive relief against the enforcement of *statutory* State rates because confiscatory is no longer debatable (*Smyth* v. *Ames*, 169 U. S., 466; 42 L. Ed., 819; *Ex Parte Young*, 209 U. S., 123; 52 L. Ed., 714), though the State could not be made a party to such an action (*id.*). But even if the State could have been so sued, that remedy would not be now available, because past, not future, acts are here involved and injunctive relief is, ordinarily, to prevent *future*, not *past*, wrongdoing. But even if proceedings in equity might have been better suited for the purpose, that fact would not prevent a defendant from asserting the defense at law or to a suit of the State by mandamus or injunction compelling obedience to the statute, or any kind of a case in which the carrier might be called to account because of a rate charged in excess of that fixed by statute. The question of convenience is for the party calling for the constitutional protection. This thought is illustrated by the cases. In *St. L. & S. F. R. Co.* v. *Gill*, 156 U. S., 649, 666; 39 L. Ed., 567, 573, it was decided that such a defense was proper to an action at law for a statutory penalty, Mr. Justice Shiras saying the carrier had "* * * a right to raise the question of the reasonableness of the statutory rates *by way of defense* to an action for the collection of the penalties."

In *Ex Parte Young*, 209 U. S., 123, 165; 52 L. Ed., 714, 731, 732, Mr. Justice Peckham said:

> "We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (*St. Louis & S. F. R. Co.* v. *Gill,* 156 U. S., 649; 39 L. Ed., 567; 15 Sup. Ct. Rep., 484), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible."

Wadley Southern R. Co. v. *Georgia,* 137 Ga., 497; 73 S. E. Rep., 741, was an action for a rate penalty to which it was decided that the unreasonableness of the rate could be pleaded. Upon review here (235 U S., 651; 59 L. Ed., 405) the thought was expressed and the cases cited in the opinion recognized as holding "in *whatever method* enforced the right to a judicial review must be substantial, adequate, and safely available." *Chicago, etc., R. Co.* v. *Wellman,* 143 U. S., 339; 36 L. Ed., 176, affirming 83 Mich., 592; 47 N. W. Rep., 489, was a suit at law for damages in refusing to sell a ticket at a statutory rate. The defense of confiscatory nature of the rates was presented at law, the case tried to a jury, and finally, upon the merits, reviewed here on error. *Lake Shore, etc., R. Co.* v. *Smith,* 173 U. S., 684; 43 L. Ed., 858, reversing 114 Mich., 460; 72 N. W. Rep., 328, was mandamus by a passenger to compel the issue of a 1,000-mile ticket. The defense of confiscation was successfully presented by answer at law. In *C., M. & St. P. R. Co.* v. *Minnesota,* 134 U. S., 418, 458; 33 L. Ed., 970, 981, the State sought by mandamus to enforce a rate, and confiscation was held to be a defense, Mr. Justice Miller, in his concurring opinion, saying:

> "But in the present case, where an application is made to the Supreme Court of the State to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the Commission, I think the

> court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the Commission before granting such relief, that it would have if called upon so to do by a bill in chancery."

The issue of confiscation was presented and determined in leading North Dakota (*Northern Pac. R. Co.* v. *North Dakota*, 236 U. S., 585; 59 L. Ed., 735; s. c., 216 U. S., 579; 54 L. Ed., 624; s. c., 26 N. Dak., 438; 145 N. W. Rep., 135), Nebraska (*State* v. *Pacific Express Co.*, 80 Neb., 823; 115 N. W. Rep., 619; *State* v. *Adams Express Co.*, 80 Neb., 840; 115 N. W. Rep., 625; *State* v. *Adams Express Co.*, 85 Neb., 25; 122 N. W. Rep., 691; *State* v. *Wells Fargo Express Co.*, 85 Neb., 42; 122 N. W. Rep., 697), and Wisconsin (*Attorney General* v. *Railroad Co.*, 35 Wis., 425) cases by answers to injunctive bills by the State to compel obedience to rate statutes.

Wherever, as here, the State, which is not subject to a suit by the carrier, in its sovereign capacity, itself seeks to enforce a statute by a recovery of refunds thereunder, there surely can be no objection to permitting a defense to be made upon the ground of the reasonableness of the rate. In such a proceeding the State is a party just as it is in a mandamus or an injunctive proceeding, and a judgment in such an action would be as binding and as conclusive as though the proceeding had been instituted against some officer of the State as defendant by the railway company as plaintiff.

Mo. Pac. R. Co. v. *Tucker*, 230 U. S., 340, 57 L. Ed., 1507, 1509, was an action at law for a penalty in not complying with a rate statute, in which Mr. Justice Van Devanter remarked that "the company defended upon the grounds that the statutory rates were confiscatory and void. * * *." That defense the lower court (82 Kan., 222, 108 Pac. Rep., 89, 91) investigated and decided upon the merits, and in maintaining the right to assert it in an action at law for the penalty, said:

> "* * * such an investigation may be made in *any* proceeding in which a carrier is called to account under the act. It is true that under the pipeline act the reasonableness of rates fixed by the board of railroad commissioners may be tested once for all in an appropriate action against the board. The right to a judicial determination of the question of reasonableness, however, is the matter of essence and substance, *and not the matter of procedure.*"

The question presented, if left to authority, can have but one answer, the result of which should be the denial of the motion to strike.

III.

Another question sought to be prematurely presented by complainant is not involved upon this particular hearing.

(*a*) The sole question now being presented is the motion of complainant to strike out paragraph 10 of defendant's answer. That which has been said fully covers all questions which *properly* arise upon that motion. Counsel, however, evidently seek to have this court now decide this question: If an *injunctive* decree against the enforcement by State officers of the penal provisions of a State railroad statute fixing rates, be subsequently, either on the merits or without prejudice, set aside, passengers are, *without more,* entitled to sue for and recover any excess in rates collected while that injunction was in force. The question thus prematurely sought to be presented is made to rest upon the *two inconsistent* theories that the cause of action *first,* is *not* for damages *caused* by any injunction, but rests solely on the common law right to recover an "exorbitant charge * * * coercively exacted;" and, *second,* is to compel *restitution* of moneys collected by virtue of the injunction and, therefore, by it wrongfully *caused* to be lost.

(*b*) The facts upon which the contention rests are not as averred in the bill, because the allegations thereof are put in issue by the answer. Moreover, the question does not arise on the present motion to strike out an independent defense. It should, therefore, not be considered at this time. Since, however, counsel insist upon arguing it, it will, under protest, be briefly *now* considered, so that it may be seen that there are many sound reasons why the point made in argument, but not in any pleading, cannot be said to rest upon substantial ground. Moreover, when there is made plain the grounds upon which complainant's claim is made to rest, it is perfectly manifest that confiscation is a defense.

IV.

Complainant cannot recover because of any common law right based upon an exorbitant charge coercively exacted, but if it could defendant would be entitled to a hearing upon its defense of confiscation.

(*a*) The *first* contention is based solely on that common law right (if not superseded by statute) arising out of a violation of a rate statute, designated by Mr. Chief Justice, then Mr. Justice, White (*Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, 436, 437; 51 L. Ed., 553, 557), as one to recover "an exorbitant charge * * * coercively exacted." The charge is thus said to have been exorbitant simply because it was in excess of the two-cent statutory rate. If that rate was confiscatory, then it was invalid and could not be the test as to whether the charge was or was not exorbitant. Hence, to a cause of action, based upon this theory, confiscation is a defense.

(*b*) Moreover, the right to recover for "an exorbitant charge * * * coercively exacted" cannot exist if the common law has been superseded by statutes providing a complete system of official supervision and creating penal-

ties for all wrong doing. In *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, 436, 437, 51 L. Ed., 553, 557, it was expressly decided that the remedies and provisions of the interstate commerce act were so exclusive that no common law right of action existed and the rate to be charged was, until otherwise directed by the Interstate Commerce Commission, that as set forth in the published tariffs. The Missouri statutes, copies of which are presented in a pamphlet herewith submitted, are modeled upon the interstate commerce law, as will appear from this slight review thereof:

The passenger act (Laws Mo., 1907, p. 170), now sections 3231, 3233, 3233 (Rev. Sts. Mo., 1909), fixed a fine of not less than $100 nor more than $500. The penal section 3248 (Rev. Sts. Mo., 1909), formerly section 1196 (Rev. Sts. Mo., 1899), provides for treble damages. Section 3187 required the publication and filing with the railroad commissioners of a tariff of rates, *fares* and charges to be made by railroad companies, making it the affirmative duty of the commissioners to see that same are reasonable and just, giving them power, with or without complaint, to have any inquiry into same and make any necessary corrections. Like provisions were made by sections 3188 and 3189. Section 3194 made it the duty of the commission to see that section 3187 was enforced, and express provisions were made in sections 3194 to 3196 for hearings and orders so as to accomplish that result. The penalties for any violation of section 3187 or for violating any order of the commission were the giving of treble damages and attorney's fees to the person injured, and $5,000 forfeiture to the school fund by sections 3193 and 3195. The right to an injunction, mandatory and otherwise, was given, by section 3201, to enforce an order of the commission, and also a fine and mandamus (Sec. 3205) against the commissioners if they failed to do their duty.

In *Young* v. *K. C., St. J. & C. B. R. Co.*, 33 Mo. App., 509, 514, after a thorough review of the authorities, it was held

that these statutory remedies were *exclusive* and there was no common law right to sue, based simply upon the ground of a rate charged in excess of that prescribed by statute. This ruling as to the statute is exactly that made here (*Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, 436, 437, 51 L. Ed., 553, 557), and was grounded on the same reasons as here given. The Young case was expressly approved and its doctrine reaffirmed in *State ex inf.* v. *A., T. & S. F. R. Co.*, 176 Mo., 687, 716, 717, where Judge Burgess said:

> "These statutes having been enacted in pursuance of the constitution, the remedies therein pointed out for redress for damages sustained is (are) *exclusive* * * *."

A like view was adopted in *Winsor Coal Co.* v. *R. Co.*, 52 Fed. Rep., 716, 721.

Besides this, the Young case has, upon the general principle announced in other cases, also been recognized as the law and several times cited with approval. (*McCormick* v. *Kaye*, 41 Mo. App., 263, 268; *Insurance Co.* v. *Anthony*, 68 Mo. App., 424, 428; *State* v. *Dalton*, 134 Mo. App., 517, 526; *Davidson* v. *Schmidt*, 146 Mo. App. 358., 368.) The statutory penalties are then exclusive of all remedies at common law and the recovery could be for nothing else. This in itself answers the first contention, and there is no ground for the claim that complainant can, on common law or general equitable principles, recover because of "an exorbitant charge * * * coercively exacted."

(*c*) It is also manifest that if a wrong rate be put in the tariff, *the schedule as published*, right or wrong, must be followed until the railroad commissioners make and enforce some different order upon the subject. The proper conduct of the railroad business could not be otherwise had. The orderly enforcement of the law could not otherwise exist. The situation under the State statute is, and the result must

be, the same as under the interstate commerce law. Such was the intention of the lawmakers, as clearly recognized in *State ex inf.* v. *R. Co.*, 176 Mo., 687, 716. If, under the interstate commerce act, the schedule is conclusive and a recovery denied, as was decided in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426; 51 L. Ed., 553, a like decision should be made under the State statute. So that, wholly irrespective of any other consideration, a noncomplaining enjoined passenger who neither asked for a changed schedule nor for security in the injunction case would have no case unless the two-cent rate appeared in the published schedule. Of this there is no pretense.

(*d*) The present question need not, however, wholly rest upon the foregoing suggestions. The statutory penalties are, as already shown, exclusive of any other right of recovery. (*Young* v. *R. Co.*, 33 Mo. App., 509, 514; State *ex inf.* v. *R.* Co., 176 Mo., 687, 716, 717.) To the penalties alone, not any common law right, the shipper must look. If these penalties were in any proper way put in a state of *legal suspense*, then, wholly irrespective of all other questions, there can be no liability. In *C., M. & St. P. Ry. Co.* v. *Minnesota, etc., Com.*, 134 U. S., 418; 33 L. Ed., 970, it was distinctly decided that any rate law which attempted to make the rates fixed conclusive was unconstitutional, because it deprived the carrier of the due process of law, and that the constitution gave the carrier the *absolute* right to a judicial investigation, which Mr. Justice Miller, in a concurring opinion, said could be had by a bill in chancery, such as was filed in original rate case. His language was approved in *St. Louis & San Francisco R. Co.* v. *Gill*, 156 U. S., 649; 39 L. Ed., 567; *Smyth* v. *Ames*, 169 U. S. 466; 42 L. Ed., 819, and *Ex Parte Young*, 209 U. S., 123; 52 L. Ed., 714. As a logical result it has been distinctly held that any attempt to impose deterrent penalties hindering the prosecution of such a suit is unconstitutional. (*Ex Parte Young*, 209 U. S., 123; 52 L. Ed., 714; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19;

53 L. Ed., 382.) The constitutional protection thus afforded is worth little if, when such a suit in equity be, *in good faith,* brought to test the validity of the rate fixed, the enforcement of the law, so far as the statutory remedies and penalties are concerned, is not definitely, instead of contingently, suspended during the entire period of such determination. This was the view, with great force and much elaboration, expressed in *Coal & Coke R. Co.* v. *Conley,* 67 W. Va., 129, 177-179; 67 S. E. Rep., 613. That case was affirmed in *C. & O. R. Co. v. Conley,* 230 U. S., 513, 522; 57 L. Ed., 1597, 1603, where Mr. Justice Hughes said:

> "While the plaintiff in error was entitled to a fair opportunity to test the constitutional validity of the prescribed rate, and penal provisions operating to preclude such an opportunity would be invalid (*Ex Parte Young,* 209 U. S., 123; 52 L. Ed., 714; 13 L. R. A. (N. S.), 932; 28 Sup. Ct. Rep., 441; 14 Ann. Cas., 764), it is clear that the provisions for penalties of the statute in question, aside from their separable character, are not open to this objection, in the light of the construction placed upon them by the State court. In construing the act, the Supreme Court of Appeals of West Virginia held: 'By the institution of a suit to determine whether such a statute is confiscatory in its operation in a particularlar case, such corporation alters its status from that of a mere corporation engaged in the public service to that of a contestant of the legislative claim of right to take its property without due process of law; and, in the absence of expression of intent to the contrary, it is presumed the legislature did not intend to affect, or interfere with, the assumption of maintenance of such status, nor to legislate upon the subject of such remedy; and the penal clause of such a statute, silent on the subject of remedy, has no application while a suit is pending, in good faith, for the determination of such question. * * * By the application of these rules and principles, a railroad company is excepted from the operation of the penalty clause of chapter 41 of the acts of 1907, during the prosecution by it, in good faith, of a suit to determine whether

> said statute is confiscatory in its operation and effect, as applied to such company.' *Coal & Coke R. Co.* v. *Conley*, 67 W. Va., 129, 133, 134; 67 S. E., 613. Under this ruling, it does not appear that the company is in a position to attack the validity of the act by reason of its penal provisions. It has had its opportunity in court, and if the act be otherwise valid, it may avoid penalties *hereafter* by complying with it."

Therefore, upon the ground alone that the cause of action could only exist by virtue of a statutory remedy which the exercise of a constitutional right put in legal abeyance, a passenger, who asked neither bond nor security, cannot recover for an alleged excessive charge made during the pendency of the litigation. His sole remedy is upon the obligation, if any, which the chancellor in his discretion required as a condition to the injunction. The fact that the constitutional right of testing the law was exercised in the approved way, an injunction was granted against putting the new rate in force, and the old rate kept scheduled, lends force to the thought that since the damage, if any, to ensue was to be really caused by the injunction, the liability therefor was one to be protected by bond, deposit or some equitable order, in the absence of which the case would be *damnum absque injuria*. For this protection, which might have been had, no request was made.

V.

Complainant cannot recover on the ground that it is entitled to the excess fares paid by its officers and is entitled to restitution, but if it could confiscation would be a defense upon which the carrier was entitled to be heard.

This brings us to the *second* and *inconsistent* ground upon which a recovery is sought. It is assumed that the injunction *caused* the *officers* to pay excess fares, and when it was dissolved the State itself, for some undisclosed reason, was

entitled to *restitution* of such excesses so legally *caused* to be paid. This upon the ground that the dissolution made *illegal* the charges theretofore *legalized* by the injunction.

(*a*) The doctrine of restitution is thus made to rest upon the ground that the injunction illegally *caused* the damage sued for. Unless it did, restitution cannot be awarded. There is, however, no liability for alleged *damages* caused by or arising out of an injunction except as the same may have been secured by the court which issued the writ. No legal damage can be so caused, the case being *damnum absque injuria*. The very foundation of the doctrine of restitution is that regular judicial process *legally* caused a damage which must be restored. Such damage not having been *legally* caused, the claim necessarily falls to the ground.

(*b*) In contesting the validity of the rates the railroad company changed its status from a mere public-service corporation to a constitutional contestant of an alleged legislative attempt to take the property without due process of law. It was entitled to litigate, and penalties for so doing could not be enforced against it. Security by the suitor could have been required, in such form or manner as a court, in its discretion, might have seen fit to order. The security could have consisted of a general injunction bond or deposit (22 Cyc., 920) or order for allowing, paying to, or crediting upon, bills of patrons, the excessive part of the rates (*Cons. Gas Co.* v. *Mayer*, 146 Fed. Rep., 150), an accounting system with bond to refund (*M., K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 503), a bond for overcharges (*Cotting* v. *K. C. Stock Yards Co.*, 82 Fed. Rep., 850, 859; *Lincoln Gas & El. Co.* v. *Lincoln*, 223 U. S., 349, 357; 56 L. Ed., 466, 470) or to refund the excess with interest (*In Re Arkansas Rates*, 163 Fed. Rep., 141, 144), or a mere agreement to keep an account of the excess and return it upon demand by the court (*In Re Louisville*, 231 U. S., 639, 642, 58 L. Ed., 413, 414; *In Re Engelhard & Sons Co.*, 231 U. S., 646, 651,

58 L. Ed., 416, 418; *Louisville* v. *Cumberland Telephone & Telegraph Co.,* 231 U. S., 652, 58 L. Ed., 419). None was asked—none required.

As this is not a suit upon an injunction bond, it may, for the purposes of this question, be assumed, as the bill alleges, as was the fact, that no bond was given, nor any order made for the security of passengers, nor either requested. As already stated, every act done by reason of the injunction or which became thereby permissible was, unless so secured, *damnum absque injuria.* That such is the law was decided in *Russell* v. *Farley,* 105 U. S., 433, 26 L. Ed., 1060, 1061, 1062, 1063, 1064, where, among other things, Mr. Justice Bradley said:

> "Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable and just."

No mere extract from the opinion can do justice to its force, learning and reasoning. It is so sweeping that every line of it should be read. Whether security shall be given or dispensed with is by the statute (Rev. Sts. U. S., sec. 718) made entirely discretionary (*U. S.* v. *Pub. Co.,* 160 Fed. Rep., 990).

In *Oelrichs* v. *Williams,* 15 Wall., 211; 21 L. Ed., 43, 45, Mr. Justice Swayne said:

> "So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants."

In *Meyers* v. *Block,* 120 U. S., 206; 30 L. Ed., 642, 643, Mr. Justice Bradley said:

> "Without a bond no damages can be recovered at all. Without a bond for the payment of damages or other obligations of like effect, a party against whom

> an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything."

The same conclusion was reached in *Scheck* v. *Kelly*, 95 Fed. Rep., 941. In *Cimiotti Unhairing Company* v. *American Fur Refining Company*, 158 Fed. Rep., 171, 172, Judge Lanning said:

> "The damage arising from the grant of an injunction *pendente lite*, in the absence of any statute or rule of court regulating the practice, is *damnum absque injuria*. For this reason the court sometimes requires a bond of indemnification against damages to be given as a condition of the grant. As the court has discretionary power to grant an injunction without such bond, it has discretionary power to fix the amount of the bond in case one be required. When a bond is given, its penal sum is notice to the applicant for injunction of the maximum risk he must assume if the injunction be issued. He cannot be required to assume a burden greater than that which the chancellor in the exercise of his discretion has imposed. * * * There is no statute or rule restricting the discretion of a Federal court in fixing the amount of an injunction bond, or in imposing terms as a condition of granting an injunction."

In *St. Louis* v. *St. Louis Gas Light Co.*, 82 Mo., 349, 353-357, there was a review of the subject as thorough as that made by Mr. Justice Bradley in *Russell* v. *Farley*, *supra*. The opinion therein should also be read in full. Among other things, it was said:

> "Thus it will be seen that the liability of the plaintiff in an injunction suit to respond to the defendant for damages after dissolution depended upon his voluntary undertaking contained in the conditions of the decree, or in his separate agreement and bond given to the court or defendant for that purpose. * * * Such exemption of the plaintiff from damages, in the absence of any terms or conditions ac-

cepted by him to pay them, rests upon the broad policy of the law, which regards the court open at all times to all persons for the enforcement of their rights by civil action. Suitors are presumably acting in accordance with law when they obtain in the courts what the courts award them, and should not be punished for accepting what they could not obtain except by such orders and judgments. When a suitor procures a writ or order of injunction upon a fair presentation of facts to the court in good faith, he has never been regarded as responsible in damages therefor, either in law or equity, unless he has made himself so by some voluntary undertaking. In such case he stands before the law like a suitor in any other process or proceeding. This I understand to be the rule, as universally recognized and approved. *Sturgis* v. *Knapp*, 33 Vt., 486; *Gorton* v. *Brown*, 27 Ill., 489; *Lawton* v. *Green*, 5 Hun., 157; *L. & O. R. R. Co.* v. *Applegate*, 8 Dana, 289; *Palmer* v. *Foley*, 71 N. Y., 106; *Russell* v. *Farley*, 105 U. S., 433; *Iron Mountain Bank* v. *Mercantile Bank*, 4 Mo. App., 505. * * * In this case there was no promise or undertaking of any kind to indemnify the defendant in the event of a dissolution of the injunction by reversal on appeal. I am not aware that deposits, conditions or bonds were ever exacted from the plaintiff upon the awarding of an injunction after final hearing. * * * A suit in which no bond or undertaking is provided for by law or exacted by the court, as to any damages resulting to the defendant from a legitimate prosecution thereof, presents an instance of *damnum absque injuria*, and is like any ordinary suit which leaves the defendant heir to much inconvenience and pecuniary loss, notwithstanding a final judgment in his favor."

Since then, *legally*, neither damage nor wrong was done by the injunction, the doctrine of restitution is not involved.

(*c*) The right to claim restitution belongs not to the State as a passenger, but exclusively to the party to the record (*M'Lagan* v. *Brown*, 11 Ill., 519; *Major* v. *Collins*, 17 Ill.

App., 239; *Edwards* v. *Phillips*, 91 N. Car., 355), for as said in 18 Enc. Pl. & Pr., 879, 880—

> "The right to claim restitution of the property taken under a reversed judgment, or its value, is one which belongs *exclusively to the defendant* or his representatives."

The State never was and could not have been a party defendant to the original cause (*Ex Parte Young*, 209 U. S., 123; 52 L. Ed., 714), and *its* right to make claim on behalf of its several officers is not made apparent. This suggestion completely answers any claim for restoration, because, if it exists, it arose in favor of and is held by the State in its proprietary capacity. On such account alone it can sue here in *this* an original proceedings.

(*d*) While it is the general rule that property received under a judgment subsequently reversed must be restored, yet the right of restitution is *not absolute*, and the party in possession of the property may deny such right by showing that he *is equitably and justly entitled thereto*. So here the defendant is entitled to show that the statutory rate was confiscatory, and that actually charged was just and reasonable; wherefore, it has the equitable and just right to keep the amount charged. Nothing in the former judgment forbids this defense as the bill was dismissed without prejudice to the right to again litigate the question of the validity of the 2-cent rate. The result is that the claim for restitution is premature. The books speak in no uncertain terms of the principle which leads to this conclusion.

In 3 Cyc., 463, it is said:

> "Restitution is *not a matter of right*, but depends upon the sound discretion of the court, and will be ordered only when the justice of the case seems to call for it. Thus, where it appears that plaintiff *is equitably entitled to retain the money*, restitution will not be ordered, though the burden is upon him to

> prove his equitable right to retain it. * * * If the merits of the controversy are not before the appellate court, restitution will, usually, not be awarded."

Speaking of the right of restitution to property obtained under judgment subsequently reversed, it is in 18 Ency. of Pr. & Pro., pp. 875, 876, 877, said:

> "In a large number of cases it is held that restitution *is not always of right*, and while it is usually granted on a reversal of a judgment, unless there is something peculiar in the case, the court, in its discretion, may refuse it where justice and propriety do not call for it. * * * Where the judgment of reversal is *not final* and it appears that the court of *review has not decided anything which renders it certain that the plaintiff has not rightly received payment* under the reversed judgment, and that on a new trial the plaintiff may be finally adjudged to hold it, restitution will as a rule be refused until the rights of the parties have been ascertained."

In *Teasdale* v. *Stoller*, 133 Mo., 645, 652, thus quoted approvingly from *Green v. Stone*, 1 Har. & J., 408:

> "'The plaintiff cannot recover * * * unless the defendant's retaining the money is contrary to equity and right. * * * The defendant *may resort to any equitable* or *conscientious defense* to repel the claim of the plaintiff, and *may show the justice of his original claim.*'"

In *Gould* v. *McFall*, 118 Pa. St., 455; 12 Atl., 336; 4 Am. St. Rep., 606, the court said:

> "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion and the court will not order it where the *justice of the case does not call for it* nor where the process is set aside for a mere slip."

In *Andrews* v. *Thum*, 18 C. C. A., 308; 71 Fed., 763, the court said:

> "Whether restitution should be made of money paid in the progress of judicial procedure, where the interest of the parties defendant are or may be adverse, *depends*, oftentimes, *on a question of fact.*"

In *Carlson v. Wintarson*, 27 N. Y. Supp., 368, an order of restitution was refused, and the court said:

> "We did not reverse the judgment upon its merits, but upon a question of law, which did not by any means preclude a recovery in the action, and, until that action was tried, we think, under the circumstances of this case, the *order should not have been granted.*"

In holding that restitution was not a matter of right, but was a matter for the court's discretion after all the evidence was heard, it was, in *State ex rel, Heyden v. Horton*, 97 N. W., 434, 436, 437, said:

> "It was the duty, of course, of the trial court to investigate the facts of the case, and ascertain *whether it was a case in which restitution was a matter of right*, or whether the case presented an exception to the rule in which the court, in the exercise of sound discretion, would not order restitution. * * * The necessity and propriety of equitable proceeding to determine whether a return of the money should be ordered was the subject of discussion, and the language quoted above must be taken as holding that *any reason, legal or equitable, for refusing to compel* a return of the money, *might be shown upon the order* to show cause."

In *Dupuy* v. *Roebuck*, 7 Ala., 474, a leading decision frequently cited with approval, held that the right of restitution was not an absolute one and that the party holding the money might as a defense to the action, show the justice of his original claim. The court said:

> "In *Duncan* v. *Ware's Ex'rs*, 5 Stew. & P., 119 (24 Am., Dec., 772), it was held that assumpsit for money had and received would lie, to recover back money

paid upon a judgment which was afterwards reversed. But in that case, as the reversal was for irregularity merely, and the debt was justly due, the defendant was permitted to retain the money. A similar decision was made in *Green* v. *Stone*, 1 Har. & J., 405, where it was said that the plaintiff could not recover, unless the retention of the money by the defendant was contrary to equity and right; the defendant *may resort to any equitable or conscientious defense to repel the claim* of the plaintiff, and *may show the justice of his original claim;* so the plaintiff may prove, that he is not in law or justice liable to pay the same. * * * The action of assumpsit for money had and received, has been sometimes assimilated to a bill in equity, and the true test to the plaintiff's right to recover, said to depend upon the fact, *whether the defendant can, in equity and good conscience, retain the money sought to be recovered.* Although the law is thus generally stated, the adjudged cases show what is meant by an equitable right to retain money paid upon a judgment, which was afterwards reversed. It must grow out of or be connected with the case in which the judgment was vacated. Thus the party who has received the money, *may show that he is entitled to recover for the cause alleged,* though he mistook the appropriate remedy, or *irregularities intervened which made it erroneous.*"

In *Crocker* v. *Clements*, 23 Ala., 296, it is said:

> "Where a decree is reversed on error after the money has been collected under it, and the suit is subsequently dismissed for want of prosecution in the court below, the defendant in the decree is *prima facie* entitled to recover back the money and *the burden of proving an equitable right to retain it is cast upon the plaintiff.*"

In Freeman on Judgments (3d Ed., p. 509, Sec. 481) the rule is thus stated:

> "The reversal of a judgment by any competent authority, restores the parties litigant to the same condition in which they were prior to its rendition. The

> judgment reversed becomes mere waste paper, and the parties to it are allowed to proceed in the court below to obtain 'final determination of their rights,' in the manner, and to the same extent, *as if their cause had never been heard or decided by any court.*"

So where, as here, the reversal was *without prejudice* to the merits which defendant desires to *now* litigate, there is no ground for restitution. A trial of the cause may result in a decree that no *unlawful* rate was ever exacted. Until that question is *finally* decided, restitution would be unjust. This thought is a demonstration that confiscation is a defense.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

STATE OF MISSOURI,
Complainant,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Defendant.

No. 16,
Original.

BRIEF AND ARGUMENT OF AMICUS CURIAE ON MOTION TO STRIKE OUT DEFENSE OF CONFISCATION.

CLIFFORD B. ALLEN,
Amicus Curiae.

J. W. STEELE & SON, 10 N. THIRD ST., ST. LOUIS

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BRIEF AND ARGUMENT OF AMICUS CURIAE ON MOTION TO STRIKE OUT DEFENSE OF CONFISCATION.

STATEMENT.

The undersigned represents many shippers of the State of Missouri who have brought suits in the State courts to collect their statutory damages against solvent railroads, which accrued while the Rate Contesting Case was pending, and who have filed intervening petitions *pro interesse suo* in the receivership proceedings of the insolvent railroads, for the recov-

ery of the excess collected over the maximum statutory rates during that time. In all these cases the defense that the maximum statutory rates of 1905 and 1907 are unconstitutional have been pleaded. A relitigation of the confiscatory character of those rates in each one of the hundreds of suits brought by shippers, would be so burdensome as to amount to a denial of justice, and would result only in "legal pandemonium."

ARGUMENT.

I.

This Court has decided in the Missouri Rate Cases that the Statutes of 1905 and 1907 were constitutionally applied to the Burlington Railroad Company during the years from 1905 to 1914, inclusive, hence this question has become Res Adjudicata.

A conclusive reason why this portion of the answer should be stricken out, is that there has already been such a contest between the railroads and the governmental authorities burdened with the enforcement of this law, which has resulted in a declaration by the Supreme Court of the United States that the statutes in question were fair on their face and that their application to the Burlington Railroad Company for the years from 1905 to 1914 was constitutional. This very defense has been adjudicated against the defendant company, as will appear from a review of the **Missouri Rate Cases, in the 230th U. S. 474.**

In the Missouri Rate Cases the statutes were found fair on their face. These cases not only decided that the statutes were constitutionally applied to the defendant and eleven other roads, but that as to six roads, during the years in question, the statutes could not be constitutionally applied. There was nothing unique in such a decision. See Briscoe v. Rudolph, 221 U. S. 547; Seattle v. Kelleher, 195 U. S. 358; Raymond v. Traction Co., 207 U. S. 20; Martin v. District, 205 U. S. 139.

In the **Missouri Rate Cases**, 230 U. S. p. 474; L. ed. Vol. 57, p. 1571, the United States Supreme Court said:

> "The decree in these three cases will accordingly be affirmed with the modification that the Railroad & Warehouse Commissioners and the Attorney-General of the State may apply at any time to the Court, by bill or otherwise, as they may be advised, for further orders and decrees whenever it shall appear that by reason of change in circumstances the rates fixed by the state act are sufficient to yield these companies reasonable compensation for the services rendered."

The Court further observed:

> "The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and each complainant, in order to succeed in assailing them, must show that as to it the rates are confiscatory."

And the Court further ordered in that case, that the cases in which the judgment of the lower court was reversed were to be remanded with directions to dismiss the bills respectively "without prejudice."

This meant, and could only mean, that not only had the Court found the statutes fair on their face, but it also found that their application to the defendants for the years from 1905 to 1914 was a constitutional application of that rate.

"Dismissed without prejudice" simply meant that if, in the future, conditions so changed that the defendant could show for a period of time subsequent to the decree that the rates did not provide a sufficient income, the defendant would then have an opportunity to appeal to the Court for a suspension as to it of the application of the statutes for that period of time. But so far as the period of time between 1905 and 1914, involved in this case, the question of the reasonable-

ness of the rate and its proper application to the defendant companies had been forever foreclosed.

If it had been the idea of the Supreme Court that the defendant railroad company should have another opportunity to present proof as to the constitutional application of that rate between the years 1905 and 1914, it would have **"reversed the case without prejudice"** and so indicated to the trial court that it was its desire to have further evidence adduced in order that they might determine that question.

This was the language used in case of *In re* City of Louisville, 231 U. S. 639; 58 L. Ed. 413. Instead, the mandate here was to **dismiss the case.** The Court had passed upon the application of those statutes to defendant for those years 1905 to 1914. The Court desired no further evidence as to that period of time. The defendant had had its "day in court" as to those years. The bill was to be dismissed, but with nothing attached to the order to prevent another application after the actual operation of the statute to relieve defendant of its application for that subsequent period of time.

That this decision had settled this particular question was also the view of the railroad company when it appeared before Judge McPherson in the Western District and asked him to enter the final decree in the cause.

In **St. Louis & San Francisco R. R. Co. v. Barker,** 210 Fed. 912, appears the following:

> "The other 13 companies from the time of final decrees herein until the 1st of July last did charge in excess of 2 cents per mile per passenger, and did charge for intrastate freight more than the statute allowed. **And the only question now presented is**

> as to what shall be done by way of procedure for the recovery back of such excess passenger rates and freight rates during the time the state statutes were not observed."

In **State** *ex rel.* **Barker v. Chicago & Alton Ry. Co.**, 216 Fed. 564, Judge Van Valkenburgh, passing upon the petition of the State of Missouri, which was substantially the same as the petition in this case, said, upon his order remanding the case to the state court from the federal court, to which the railroad company was attempting to remove it:

> "The suits are not on the bond, nor from any damages accruing from the injunction as such. They seek merely to recover alleged over-payment of rates and charges made under practical duress, and in violation of the terms of what **has now been adjudicated to be a valid statute regulation.**"

The Interstate Commerce Commission also interpreted the Missouri Rate Cases as having decided the constitutionality of the statute and that it was not confiscatory as applied to the defendant during the years in question.

In cases of **Merchants Exchange of St. Louis, Mo., v. Baltimore and Ohio R. R. Co.. No. 6628,** and the **Southwestern Missouri Millers' Club v. Chicago & Alton R. R. Co., No. 6662,** decided June 14, 1915, and reported on pages 341-359, *l. c.* 356, of the 34th Interstate Commerce Commission's Reports, appears the following:

> "The Missouri intrastate rate on grain and grain products and other commodities were under consideration in the Missouri Rate Cases, 230 U. S. 474. Simultaneously with the decision in those cases the United States Supreme Court rendered

> its decision in the Minnesota Rate Cases, in which the legality of rates established on intrastate traffic by the Minnesota Railroad and Warehouse Commission were under consideration. Both cases arose upon petitions by the carriers for injunctions to restrain the enforcement of the state rates, which relief was denied, **the Court deciding that the rates established by the states were not confiscatory.''**

In **Wadley Southern Railway Co. v. Georgia,** 235 U. S. 651, the Supreme Court of the United States said:

> ''Whether they were reasonable or not was not apparent on the face of the statute, but was dependent upon proof of extrinsic facts. How doubtful and uncertain that then was is illustrated by the fact that in the Minnesota Rate Case (Simpson v. Shepard, 230 U. S. 472, 473, 57 L. ed. 1570, 1571, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729), these legislative rates were subsequently **held to be confiscatory as to some carriers and as to others not confiscatory''**

As examination of the Missouri Rate Case will disclose practically the same language in the opinion as in the Minnesota Rate Case, and the Supreme Court of the United States certainly thought it was deciding that the rate was confiscatory as to five railroads in Missouri, and was not confiscatory as to thirteen railroads. There can be no escape from this conclusion.

That the railroads themselves and the Public Service Commission of Missouri understood that the Supreme Court of the United States had decided that the Maximum Freight Rate statutes were constitutionally applied to this defendant very conclusively appears upon page 10 of the Opinion and Order of the Public Service

Commission of the State of Missouri in the Matter of the **Application of the Atchison, Topeka and Santa Fe Railroad Co.** *et al.*:

> "Thereupon this Commission arranged the conference with representatives of all carriers as to **which the said statutes were sustained,** with a view of having the rates prescribed by said law put into force and effect."

In State *ex rel.* **v. Chicago & Alton R. R. Co.**, 265 Mo. 682, the Court said, speaking of claims similar to the one in suit:

> "The claim which the learned Attorney-General seeks to recover in the present action, are but claims for excess freight and passenger rates, i. e., rates which were charged in violation of a valid law."

Again, p. 687, it is said:

> "As said before, the only thing which is in common to all these claims is that they arose out of a failure to comply with certain laws **which have been determined to be valid.**"

All these tribunals understood that the application of these rate statutes to the major roads of Missouri had been upheld. It is earnestly contended that this matter has become *res adjudicata.*

II.

The Confiscatory Character of a Statutory Rate Cannot be Adjudicated in a Suit by a Shipper against a Carrier.

Another reason, however, why it should be stricken out is that the question of the confiscatory character of

a rate cannot be adjudicated in a case in which the public is not represented. This has been decided in many cases. The most recent one is *In re* **Engelhard & Sons Co., Petitioners,** 231 U. S. 646, 58 L. ed. 416. It is there said (*l. c.* 418):

> "This is a necessary deduction from the cases. It is the universal practice, sustained by authority, that the **only** mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them, or is charged with the duty of enforcing them. As was said by Mr. Justice Miller, in Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 460; 33 L. ed. 970, 982; 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 702, it was not competent for each individual having dealings with the regulated company 'to raise a contest in the courts over questions which ought to be settled in this general and conclusive way.' The rule has been repeated in subsequent cases."

The Court could have added, had it there been necessary, all that Justice Miller said in the paragraph it quoted from, which was:

> "That until this is done (a decision in equity in which the public was represented) it is not competent for each individual who has dealings with the carrying corporation, **or for the corporation with regard to each individual who demands its service, to raise a contest over the question which ought to be settled in this general and conclusive method.**"

In the case of **St. L. & S. F. R. Co. v. J. B. Gill,** 156 U. S. 649, J. B Gill brought an action against the railroad company alleging that said company, operating a railroad within the State of Arkansas, had on five distinct occasions charged and received from the plain-

tiff more than three cents per mile, and demanded judgment for the penalty prescribed in the statute. The railroad company filed several pleas to the complaint, two of which are alleged to have raised federal questions. To these special pleas the plaintiff demurred and the demurrer was sustained. The defendant then made several offers tending to show that the rate of three cents per mile for each passenger carried was unreasonable and did not enable the defendant to pay its interest or to earn anything on its capital stock. These offers were ruled out on plaintiff's objection, as incompetent and irrelevant. Two exceptions were taken by defendant to the action of the Court in sustaining the demurrer and excluding the evidence. Judgment went for plaintiff, which was on appeal affirmed by the Supreme Court of Arkansas, to whose judgment a writ of error was sued out from the Supreme Court of the United States, and on hearing before the Supreme Court the judgment of the Supreme Court of Arkansas was affirmed. In so deciding the Court said:

> "Sometimes in acting on this subject the state legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity, or some equivalent proceeding, wherein the rights of the public, as well as those of company complaining, can be protected."

And the Court continues that it is only in those cases where there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, be-

cause there is no public functionary or commission which could be made to respond, and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense, to an action for the collection of the penalties. And in this case the Court, by reason of the fact that the public was in no adequate sense represented, sustained the action of the State Court.

The absence of anyone representing the public was in the case of **Chicago & G. T. R. Co. v. Wellman,** 143 U. S., at page 346, again commented upon in sustaining the judgment below in a suit by a passenger for collecting three cents a mile when the statutory rate was two. It is there said:

> "In the stipulation of facts, or in the taking of testimony before the Court below, neither the Attorney-General or any other person interested for or employed on behalf of the people of the state took any part."

In Missouri, under the Act of the Legislature of 1913 creating the Public Service Commission, ample provisions are there made for a judicial review both of legislative and administrative rates in the State Court, and the Judicial Code of the United States (Comp. Stat. U. S. 1913, Sec. 1242) provides the method for such review in the federal courts of the United States (Wadley So. Ry. Co. v. Georgia, 235 U. S., at page 651). The public policy of the nation, as well as the public policy of the State, is against the contest of the confiscatory character of the statute by way of defense to a suit by a passenger or a shipper.

In **Central of Georgia Ry. Co. v. Railroad Commis-**

sioners of Alabama, 161 Fed., *l. c.* 972, 973, the Court said:

> "It is the policy of our laws—indeed, their express command—that litigation to determine the reasonableness of rates shall not be waged except in suits where some tribunal intrusted with the duty of caring for the public interests in the matter of rates is made a party. The confusion, distress and uncertainty which would result if such questions were determined in suits between carriers and private parties is apparent on the face of such a situation. There might be collusion. The burden of contesting rates would deter private parties from undertaking it. **To leave such issues to be determined in suits by private parties, which would be prosecuted in different localities, in great numbers, in different courts, at the same time, in which variant decisions would frequently be reached, even on the same state of facts, would result in business paralysis and legal pandemonium. Uniformity and fixedness, which, next to the reasonableness and fairness of the rates, is so essential to the welfare of all who deal with the carrier or buy and sell in the markets, would be utterly destroyed.** It was the realization of the evils of allowing such matters to be tested in suits between private parties, so often adverted to in the decisions of the courts, which caused the Legislature of Alabama, in the first instance, wisely to provide for a suit against the Railroad Commission and the Attorney-General in a court of equity, wherein, by one comprehensive suit, the whole matter could be contested and adjusted in a way which would bind the carrier, the shipper, the passenger, and the public authorities alike."

See also **Ex parte Young,** 209 U. S. 123.

In the case of **State** *ex rel.* **v. Public Service Commission,** reported in Vol. 259 Mo. Rep., p. 72, it is held that

the question of the confiscatory character of rates must be contested in the first instance before the Public Service Commission, and their action thereon is a prerequisite to either a suit by a shipper for any excess collections thereabove, or a defense by a carrier that a particular rate is unreasonable and confiscatory. The unanimous opinion of the Court contains the following:

> "This leaves the statutory maximum rates in force **until facts established before the Commission call into play the modification contemplated by the Utilities Act.** In no other way can the statute be given vigor and made a complete and rounded scheme adjusting itself to meet the form and pressure of the particular case."

In the recent case of **State** *ex rel.* **Public Service Commission v. Baltimore & Ohio R. Co.,** 85 S. E. 714, P. U. R. 1915D, 568 (decided June 1, 1915), the Supreme Court of Appeals of the State of West Virginia said:

> "If it be true, as contended, that the statutory rate for passenger and baggage, as to respondent, operates to deprive it of a reasonable and lawful return for the services rendered, and therefore confiscatory, the proper construction of the act creating the Public Service Commission, in our opinion, requires that **resort be first** had to that Commission as the primary forum in which to have investigated and determined those questions. That Commission being given the power and authority to investigate and to change any intrastate charge or toll which is unjust or unreasonable, and to prescribe a rate that will be just and reasonable, must be construed to include the power to change the rate prescribed by the statute, if such maximum rate is in fact confiscatory and void on constitution or other grounds. In our opinion this power must necessarily have been included in the plan and scheme of the legislature in creating the Commission; otherwise corporations so affected would be put beyond the control

of the Public Service Commission, while other corporations as to whom the rate prescribed by statute is not confiscatory would remain subject to its control. In our opinion the statute **binds and controls respondent until it has been lawfully determined by the Public Service Commission, or afterward by a court of competent jurisdiction, that the prescribed rate is confiscatory.** And while the Commission may not have been empowered at the time these proceedings were begun to suspend a rate lawfully promulgated, it has the specific power given by the provision of the statute quoted, to require respondent to conform to the law of the state, and this includes jurisdiction and power to require it to adhere to the rate prescribed by the statute, until by lawful, orderly proceedings under the statute, by application to the Public Service Commission, that rate has been lawfully suspended or changed; for **until then that law must be regarded the law of the state, enforceable against the railway company.**"

The Utilities Act, this decision of the Supreme Court of Missouri, and the cases referred to, demonstrate that in Missouri the confiscatory character, or the reasonableness of a rate, cannot in the first instances be adjudicated in a suit by a shipper against a carrier, but the validity of the rate must **first** be **passed upon by the Public Service Commission.**

And until the rate has been suspended or changed thereby, it is binding upon the carrier.

III.

It is Too Late to Again Contest the Alleged Confiscatory Character of the Act of 1905.

The rates provided for by the Act of 1905 operated until the Act was repealed in 1907. After its repeal it is

too late to contest the constitutionality of the statute rate. **Ga. Ry. v. R. R. Commissioners of Ala.**, 161 Fed. p. 973; **Railway Co. v. Commission**, 196 Fed. 560.

IV.

The Railroads Should Not Be Permitted to Plead That the Rates Which They Had Superseded Were Confiscatory, in an Action by the Shippers to Recover the Money Exacted During the Rate Contesting Case.

This phase of the case has been so ably presented by the Attorney-General of Missouri that we will content ourselves with reference to the case of **Love v. North American Co., 229 Fed.**, *l. c.* 107.

It is respectfully submitted that the motion to strike out should be sustained.

CLIFFORD B. ALLEN,
Amicus Curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

STATE OF MISSOURI,
Complainant,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Defendant.
} Original No. 16.

BRIEF AND ARGUMENT OF W. T. ALDEN, AMICUS CURIAE, REPRESENTING CERTAIN MISSOURI SHIPPERS.

W. T. ALDEN,
As *Amicus Curiae.*

Geo. Hornstein Co., Printer, Chicago.

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STATEMENT OF THE CASE.

The undersigned, representing a large number of shippers over the Chicago, Rock Island & Pacific Railway Company, similarly situated, so far as that carrier is concerned, with the complainant in this suit, is vitally interested in the issues involved in this controversy, and has applied for, and obtained, permission to file a brief in this cause, as *amicus curiae.*

This suit is an aftermath of the *Missouri Rate Cases* reported in 230 U. S., at page 474. The *Missouri Rate Cases,* as this Honorable Court will re-

member, involved the constitutionality of certain statutes of the State of Missouri, commonly known as the Maximum Freight Act of 1905 and the Maximum Freight and Passenger Act of 1907. Eighteen of the railroad companies affected by these acts and by the reductions in freight and passenger rates provided for therein filed bills attacking them on the ground that they were confiscatory, and secured a perpetual injunction against the enforcement of the same. The defendant in this cause, and also the Chicago, Rock Island & Pacific Railway Company, were parties complainant in those proceedings.

On appeal to this court, however, the decrees of the Chancellor were reversed, except as to the St. Louis & Hannibal Railway Company, the Kansas City, Clinton & Springfield Railway Company and the Chicago Great Western Railway Company, and the cases remanded with directions to dismiss the bills without prejudice. (230 U. S., 474.)

On February 6, 1914, the trial court complied with the mandates of this court and entered decrees in conformity therewith. Thereupon the State of Missouri filed this bill to recover back approximately $1,400 excess charges which it had been compelled to pay the C. B. & Q. Railroad Company for the carriage of its officers, agents and employees during the time the application of the passenger rates fixed by the 1907 act was suspended by the injunction order aforesaid.

The defenses raised in the answer of the defendant filed in this court are identical with the defenses urged by the receiver of the C. R. I. & P. Ry. Co. in the proceedings for the recovery of overcharges

instituted by the shippers represented by the undersigned and are as follows:

(1) That the liability of the defendant to all shippers and travelers, including the complainant, on account of the issuance of the injunction in question, is limited to the amount of the bond given in that proceeding, namely, $10,000.

(2) The cause of action is barred by the Statute of Limitations.

(3) The rates prescribed by the Acts of 1905 and 1907 were and are confiscatory, and in violation of the Constitution and amendments thereof, of the United States, and hence were and are illegal and void.

The complainant has made a motion to strike that portion of defendant's answer setting up the defense of confiscation, and this brief will be devoted to a discussion of that motion.

POINTS AND AUTHORITIES.

I.

IT IS THE DUTY OF THE DEFENDANT TO RESTORE THE EXCESSIVE CHARGES COLLECTED DURING THE PENDENCY OF THE INJUNCTION IN THE MISSOURI RATE CASES.

Love et al. v. *North American Co. et al.*, 229 Fed., 103.

Northwestern Fuel Co. v. *Brock*, 139 U. S., 216; 35 L. Ed., 151.

U. S. Bank v. *Bank of Washington*, 6 Pet., 817; 8 L. Ed., 299-304.

Bellamy v. *St. L. I. M. & S. R. R. Co.*, 220 Fed., 876.

Brown v. *Detroit Trust Company*, 193 Fed., 672-676.

Lanyon v. *Chesney*, 209 Mo., 1.

City of St. Louis v. *St. Louis Gas Light Co.*, 70 Mo., 69.

Haebler v. *Meyers*, 132 N. Y., 363.

Zimmerman v. *Bank*, 56 Iowa, 133.

II.

The proper remedy against a schedule of rates alleged to be unremunerative and confiscatory is by a bill in equity against the officers and authorities of the State charged with the duty of establishing or enforcing such rates. The convenience to the court and the protection of litigants alike demand that such questions be tested out in a direct proceeding for that purpose, and carriers will not be

permitted to make such a defense to a suit for overcharges filed by individual shippers.

C. M. & St. P. R. Co. v. *Minn.*, 134 U. S., 418-460; 33 L. Ed., 970-982.

Ex parte Young, 209 U. S., 123; 52 L. Ed., 714-731.

In re Engelhard & Sons Co., 231 U. S., 646; 58 L. Ed., 416-418.

St. L. & S. F. R. R. Co. v. *Gill*, 156 U. S., 649; 39 L. Ed., 566-571.

C. of Ga. Ry. Co. v. *Ry. Com. of Ala.*, 161 Fed., 925, 972, 973.

St. L. & S. F. R. R. Co. v. *Barker*, 210 Fed., 902-916.

Allen v. *St. L. I. M. & S. R. R. Co.*, 230 U. S., 553; 57 L. Ed., 1625.

Simpson v. *Shepard*, 230 U. S., 352; 57 L. Ed., 1511.

Knott v. *C. B. & Q. R. R.*, 230 U. S., 474; 57 L. Ed., 1571.

C. & O. R. R. Co. v. *Conley*, 230 U. S., 513; 57 L. Ed., 1597.

O. R. & N. Co. v. *Campbell*, 230 U. S., 66; 57 L. Ed., 1605.

III.

It is true this is a rule of procedure which is founded on convenience, and it may be deviated from where it would work hardship or perpetuate injustice, but the case at bar does not fall within any of the exceptions established or recognized by the previous decisions of this court.

St. L. & S. F. R. R. Co. v. *Gill*, 156 U. S., 649; 39 L. Ed., 566-573.

Ex parte Young, 209 U. S., 123; 52 L. Ed., 714-731.

IV.

On the contrary, the case at bar presents those very elements and considerations which this court has frequently pointed to and relied upon in holding that the proper mode of relief against a body of rates on the ground that they are unreasonably low and confiscatory is by a direct proceeding in equity against the governmental authorities charged with the duty of enforcing such rates.

(a) To leave such issues to be determined in suits by private parties, which would be prosecuted in different localities in great numbers, and in different courts at the same time, in which variant decisions would frequently be reached, even on the same state of facts, would result in business paralysis and legal pandemonium.

> *C. of Ga. Ry. Co.* v. *Ry. Com. of Ala.*, 161 Fed., 925, 972, 973.

(b) The expense of combating the defense of confiscation would be so burdensome, and the delays attendant upon the proper presentation of evidence so onerous, that individual shippers would not have the means to carry on litigation, and a practical denial of justice would result in many, if not most, cases.

> *Ex parte Young*, 209 U. S., 123; 52 L. Ed., 714-731.
>
> *C. M. & St. P.* v. *Minn.*, 134 U. S., 418-460; 33 L. Ed., 970-982.

(c) This defendant elected in the beginning to contest the validity of the Missouri rate acts by a

direct proceeding, and after having carried on litigation of that character for eight years it ought not to be permitted now to adopt another mode of relief.

(d) When, in obedience to the mandate of this court, the bill of this defendant—a complainant in the *Missouri Rate Cases*—was dismissed without prejudice, it was incumbent upon the defendant to proceed without delay to file a new bill attacking the constitutionality of the Missouri rate laws. Its failure so to do constituted *laches*, which should bar it from now urging that defense.

(e) It is an established rule that a carrier must charge the published tariff rates in the transportation of freight and passengers, and cannot depart therefrom to any extent or in any respect.

Act Feb. 4, 1887, C. 104, Sec. 6, Art. 7 (Interstate Commerce Act).

Sec. 3187, Rev. Statutes of Mo., 1909.

L. & N. R. R. Co. v. *Motley*, 219 U. S., 467, 477; 55 L. Ed., 297.

American Sugar Refining Co. v. *D. L. & W. R. Co.*, 207 Fed., 733-742.

When the bills enjoining the enforcement of the Missouri Maximum Freight and Passenger Laws of 1905 and 1907 were dismissed without prejudice, those laws became valid and effective from the date of their enactment; hence, it was and is unlawful for the defendant to charge, collect, demand or retain any greater or less compensation for the transportation of property or passengers than is specified in such acts.

Pierce v. *Pierce*, 46 Ind., 86.

McCullum v. *McConaughy*, 141 Ia., 172.

ARGUMENT.

I.

IT IS THE DUTY OF THE DEFENDANT TO RESTORE THE EXCESSIVE CHARGES COLLECTED DURING THE PENDENCY OF THE INJUNCTION IN THE MISSOURI RATE CASES.

It is a principle deeply rooted in equity, and in the law as well, that upon the reversal of a judgment or decree the party securing the same, or profiting therefrom, is bound to restore the property or relinquish the benefits obtained by means of such judgment or decree. This is a rule of simple justice which courts out of regard for the rights of aggrieved litigants scrupulously adhere to.

(See citation of cases under Sub. I, "Points and Authorities.")

The bill in this case falls squarely within the principle announced in those cases. Its object is to recover property forcibly taken from the complainant under a decree of court afterwards held to be illegal and void. When that decree was vacated and set aside and the bill in pursuance of which it was entered was dismissed, the Maximum Freight and Passenger Rate laws of 1905 and 1907 were automatically reinstated and made effective from the dates of their enactment. It then became the duty of the defendant to restore the excessive freight and passenger charges illegally exacted by it in violation of the valid constitutional regulations of the Legislature of the State of Missouri.

Without engaging in a lengthy argument about a principle of law so well defined and established, we take the liberty of quoting from the opinion in *Love* v. *North American Co.*, 229 Fed., 103-106. In this case the Circuit Court of Appeals for the Eighth Circuit, in disposing of the equities of a case identical with the case at bar, said:

> "The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor the Frisco Company itself. Without question they belong to the shippers. We must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the Corporation Commission, to blind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for transportation of freight. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers, like the receivers, the money belonged to the shippers after the payment the same as before. It will be presumed that it was a part of the money in the treasury of the company which passed to the receivers. That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. * * *
>
> "There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained,

the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity."

II.

THIS IS NOT AN APPROPRIATE PROCEEDING IN WHICH TO TRY OUT THE DEFENSE THAT THE STATUTES OF 1905 AND 1907 ARE CONFISCATORY, AND HENCE, UNCONSTITUTIONAL AND VOID.

It probably will not be denied by defendant that under the general rule applicable in such cases the proper remedy against a schedule of rates alleged to be confiscatory is by a bill in equity against the governmental authorities charged with the duty of establishing or enforcing such rates. That rule was first clearly defined and established by Mr. Justice Miller of this court in *C. M. & St. P. R. Co.* v. *Minnesota,* 134 U. S., 418-460; 33 L. Ed., 970-982, and has been recognized and approved in many later decisions.

Ex parte Young, 209 U. S., 123; 52 L. Ed., 714-731.

In re Engelhard & Sons Co., 231 U. S., 646; 58 L. Ed., 416-418.

C. of Ga. Ry. Co. v. *Ry. Com. of Ala.,* 161 Fed., 925-972.

Simpson v. *Shepard,* 230 U. S., 352; 57 L. Ed., 1511 (Minnesota Rate Cases).

Allen v. *St. L. I. M. & S. R. R. Co.,* 230 U. S., 553; 57 L. Ed., 1625 (Arkansas Rate Cases), etc.

That the defendant itself considered this the proper and efficacious mode of relief against oppressive rate regulations is demonstrated by the fact that it originally adopted this very remedy for the purpose of testing out the constitutionality of the Missouri statutes. See:

> *Mo. Rate Cases*, 155 Fed., 220; 230 U. S., 474; 57 L. Ed., 1571.

Therefore, unless the case at bar constitutes an exception to the general rule stated above, it follows that it is not the kind of an action where confiscation can be pleaded in bar of a recovery.

The only case I have been able to locate, defining or discussing the exceptions to the general rule, is *St. L. & S. F. R. R. Co.* v. *Gill*, 156 U. S., 649; 39 L. Ed., 566-573.

In the latter case Mr. Justice Shiras said:

> "Sometimes in acting on this subject the state Legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected.
>
> "But there are other cases, and the present is one, where the Legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary

> or commission which can be made to respond, and, therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

It is submitted that the case at bar does not come within the rule in the *Gill* case, *supra*, and that the effort on the part of defendant to interpose the defense of confiscation in this suit finds no justification in the adjudicated cases on the subject. Therefore it only remains to be considered whether this court ought to create an exception to meet the exigencies of the occasion—that is, whether defendant's equities are so persuasive and impelling that the interests of justice demand they should be protected, even at the cost of ignoring or violating a long established and well defined rule of procedure.

The defendant argues that if the rates prescribed by the 1905 and 1907 statutes are confiscatory, it should be given every reasonable opportunity to demonstrate that fact and should not be compelled to make restitution until the question has been fully and fairly passed upon. This is certainly a plausible argument, and one that presents every outward appearance of fairness. The vast sums of money invested in railroad properties, their relation to the business interests of the country, and the great numbers of people whose welfare is directly or indirectly bound up with their prosperity, all demand that railroad companies be given the full benefit and protection of the laws. Furthermore, the Constitution

of the United States inhibits the taking of their property without due process of law.

The fact of the matter is, however, that the defendant and every other railroad in the State of Missouri were afforded a reasonable opportunity to test the constitutionality of the Maximum Freight and Passenger Acts of 1905 and 1907. Before the statutes became effective, bills were filed by all railroads operating locally in the State, to enjoin the enforcement of the rates. Those cases are known as the *Missouri Rate Cases*, and were pending from June, 1905, to February, 1914, or for about nine years.

> "The parties were producing evidence and preparing their evidence for about one year, with the aid of experts on each side. * * * The experts on each side were given the fullest opportunity and all the time desired to obtain the information and put the same in form in exhibits, schedules and reports, all of which are in evidence in the cases, supplemented by the oral testimony of each of the experts with reference to all of these things. * * * Thousands of pages of testimony, taking weeks of time, have been filed. This testimony was orally presented, part to the Master and part to the court, accompanied with volumes of statements, reports, schedules and tables. Every phase of every question of both debit and credit has been worked out, tabulated and filed. These exhibits are the result of something like one year of work by the expert accountants representing both sides, as a result of their examinations of train reports, waybills, auditors' books, and of the accounts of the passenger and traffic departments of the several roads. This work required not only much time, but energy, and patience, and learning, and great skill. But each side had

accountants of the highest character, and possessing all of those qualifications. The four accountants, Mr. Peabody and Mr. Johnson, representing the railway companies, and Mr. Taliaferro and Mr. Hamilton, representing the state, impressed me, after hearing them testify and being in consultation with them for 10 days after the cases were submitted, that the sole purpose of their work was to exhibit the truth, differing only as to extra cost, and that difference of extra cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides. During the 10 days following the submission of the cases, they and the court being alone, at the request of the court they prepared a statement in each of the nine cases submitted, which have been ordered filed. To each of the nine statements is appended a certificate showing the time covered, and that such statement correctly shows the results of the various assumptions set forth therein, which certificates were signed by the four expert accountants. Seldom, if ever, is a court under greater obligations to expert accountants, representing the two sides than the court and all parties, the railroads and the public, owe these four gentlemen. Usually experts representing different sides do not agree to anything. Here experts representing the different sides agree to everything pertaining to the accounting, the differences only arising as to the basis.

"The court is likewise much indebted to counsel on both sides, who for four days argued these cases with a fairness, and wealth of learning, and eloquence seldom displayed at the bar. And now, after the fullest investigation of the record, the court has reached the conclusion that upon this question of fact the statutory rates

fixed by either and both statutes are not remunerative. And it only remains for the court to give the reasons for such conclusion. And, in giving these reasons, clearness is added by eliminating those things so clearly established by the evidence, or so nearly conceded in matters of law as not to be debatable."

St. L. & S. F. R. Co. v. *Hadley*, 168 Fed. Rep., 317, 321, 352.

These excerpts from the statement and opinion of Judge McPherson in the *Missouri Rate Cases* show that the defendant has had its day in court. They show, furthermore, that the railroad companies prepared their cases thoroughly, that they were allowed to take all the time that was necessary in the preparation and presentation of their evidence, that they were represented by able counsel, and that they succeeded in inducing the trial court to adopt their view of the law on the principal controversy involved in the injunction suits. Every objection which could be devised by their counsel to the constitutionality of the Missouri Freight and Passenger Acts was raised in these cases, and every bit of evidence that could be secured to support such objections was introduced. Everything that industry and intelligence could accomplish in behalf of the railroads was accomplished.

When, upon appeal to this court it was decided that the railroads had failed to establish that the rates were confiscatory, and the decrees were reversed with directions to dismiss the bills, this defendant knew it was useless to struggle further. It knew that it had been given the fullest opportunity

to prove its contention—the same contention that it is now seeking to make here, and that it had failed.

If this defendant and the other railroads operating in the State of Missouri believed they could adduce additional evidence on the question of the unreasonableness of these acts, why did they not prepare and file new bills for injunction? They take the position that remedy is still open to them. The mandates of this court were docketed and the original bills dismissed on February 6, 1914; yet, during the time that has since elapsed no affirmative action has been taken to prevent the enforcement of the rates. On the contrary, immediately upon the dismissal of the original bills the carriers voluntarily put the reduced rates into effect, and have since observed them in the transportation of freight and passengers. They thereby confessed that these rates are valid and reasonable. That confession is in perfect accord with the presumption of law applicable to a state statute regulating railroad rates.

Ex parte Young, 209 U. S., 123; 52 L. Ed., 714-731.

Southern Ry. Co. v. *R. R. Com.*, 196 Fed., 558-560.

If the defendant is allowed to introduce evidence to establish the defense of confiscation, it and other carriers within the State of Missouri will point to this case as a precedent for the introduction of similar evidence in every other suit brought by each individual shipper and passenger for the recovery of overcharges during the time the Missouri Acts of 1905 and 1907 were suspended. If such is the law,

then the shippers and travelers may as well forego all hope of ever getting back the charges illegally exacted from them, because the expense of prosecuting a suit for that purpose to its conclusion would be prohibitive.

Even if a combination of shippers could be organized to prosecute such actions, they would be compelled to file as many bills as there are carriers involved. In one case the court might hold the law constitutional, and in another case pending at the same time, and on the same evidence, the opposite conclusion might be reached. Conflicting decisions of this kind would be inevitable. They would produce business chaos and result in rank discrimination between shippers and localities. The evils that would result from a recognition of the right of the defendant to now claim confiscation as a defense to suits to recover these overcharges have been graphically described by Judge Jones in *C. of Ga. Ry. Co.* v. *R. R. Com. of Ala.*, 161 Fed., 925-972:

> "It is the policy of our laws—indeed, their express command—that litigation to determine the reasonableness of rates shall not be waged, except in suits where some tribunal intrusted with the duty of caring for the public interests in the matter of rate is made a party. The confusion, distress and uncertainty which would result if such questions were determined in suits between carriers and private parties is apparent on the face of such a situation. There might be collusion. The burden of contesting rates would deter private parties from undertaking it. To leave such issues to be determined in suits by private parties, which would be prosecuted in different localities, in great numbers, in different courts, at the same time, in which

> variant decisions would frequently be reached, even on the same state of facts, would result in business paralysis and legal pandemonium. Uniformity and fixedness, which, next to the reasonableness and fairness of the rates, is so essential to the welfare of all who deal with the carrier or buy or sell in the markets, would be utterly destroyed. It was the realization of the evils of allowing such matters to be tested in suits between private parties, so often adverted to in the decisions of the courts, which caused the Legislature of Alabama, in the first instance, wisely to provide for a suit against the Railroad Commission and the Attorney General in a court of equity, wherein, by one comprehensive suit, the whole matter could be contested and adjusted in a way which would bind the carrier, the shipper, the passenger and the public authorities alike."

This court has had occasion to consider the right of a carrier to raise a contest in the courts, with each individual shipper, over the validity of rates established by state laws, and in those cases that right has been denied as cumbersome and inefficacious.

In *C. M. & St. P. R. Co.* v. *Minnesota*, 134 U. S., 418; 33 L. Ed., 970-982, Mr. Justice Miller said:

> "That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

See, also:

Simpson v. *Shepard*, 230 U. S., 352; 57 L. Ed., 1511 (Minnesota Rate Cases).

Knott v. *C. B. & Q. R. R. Co.*, 230 U. S., 474; 57 L. Ed., 1571 (Missouri Rate Cases).

Allen v. *St. L. I. M. & S. R. Co.*, 230 U. S., 553; 57 L. Ed., 1625.

C. & O. R. R. Co. v. *Conley*, 230 U. S., 513; 57 L. Ed., 1597.

O. R. & N. Co. v. *Campbell*, 230 U. S., 66; 57 L. Ed., 1605.

In the decisions above adverted to the carriers have been the ones that contended for the rule that the proper remedy against a schedule of rates claimed to be confiscatory was by bill in equity against the governmental authorities charged with the duty of establishing or enforcing such rates.

This doctrine was first grafted into the law at the behest of the railroad companies. They have since invoked its aid and secured its recognition so frequently that it has become a settled rule of procedure. They have profited by it on numerous occasions, and I do not know of a single case where it has ever been deviated from.

The defendant, having helped to establish and enforce this rule, equity should now refuse to permit

it to evade its consequences, particularly because an evasion of the rule in question is sought only for the purpose of raising a defense that has been fully tried out and tested by this defendant in the *Missouri Rate Cases.*

There is another reason why it is inequitable for defendant to raise the defense of confiscation in this action. When, in obedience to the mandate of this court, the bills in the *Missouri Rate Cases* were dismissed, the 1905 and 1907 Maximum Freight and Passenger Laws became valid as of the date of their enactment, and not as of the date of the judicial declaration of their constitutionality. (*Pierce* v. *Pierce*, 46 Ind., 86; *McCullum* v. *McConaughy*, 141 Ia., 172.) And the rates prescribed by those acts became the statutory or published tariff rates applicable to business moving locally within the State of Missouri.

Now, it is well settled that under the Interstate Commerce Act it is the duty of railroad companies to charge the published tariff rates, and they cannot depart therefrom to any extent or in any respect. Act February 4, 1887, C. 104, Sec. 6, Art. 7; *L. & N. R. R. Co.* v. *Motley*, 219 U. S., 467, 477; 55 L. Ed., 297; *American Sugar Ref. Co.* v. *D. L. & W. R. Co.*, 207 Fed., 733-742.

It is immaterial whether such published tariff rates are unreasonable and confiscatory, so far as a shipper is concerned. The fact that they are the tariff rates requires the railroads to collect accordingly. If the shipper, after having received or shipped goods on credit, refused to pay for the transportation thereof at the regular published tar-

iff rates, he could not, in an action by the carrier for the freight charges, set up the defense that the rates charged him were excessive and unreasonable. He is obliged in every case to pay the tariff rates, and if they are unreasonable he has no recourse in an action at law or in equity to recover the excess over the reasonable rates. The only redress at his disposal is to file a complaint before the Interstate Commerce Commission and to ask for reparation there. The Commission may hold the rates are excessive and order reductions, but in such event it will not award reparation as a matter of right. The carriers may be allowed to retain the unreasonable charges collected on past business.

Now, in this case the defendant occupies the same position as the shipper in a suit by a carrier to collect freight charges according to the tariff rates. The Maximum Freight and Passenger Acts of 1905 and 1907 constitute the regular published tariff rates for the intrastate transportation of passengers and the commodities covered thereby. Those are valid and constitutional enactments until declared otherwise by a court of competent jurisdiction. *Ex parte Young*, 209 U. S., 123; 52 L. Ed., 714-731.

The statutes of Missouri make it obligatory on the railroad companies to charge the statutory or published tariff rates and prohibits them from departing therefrom. Sec. 3187, Rev. Statutes of Missouri, 1909. That statute is self-executing, and the departure from the tariff rates constitutes a violation of the same.

This suit is a suit to collect overcharges resulting from a departure from the tariff rates—that is,

it is a suit to compel observance of the rates published in the tariffs or statutes of the State of Missouri. The same rule of law that prohibits the shipper from raising the defense of "confiscation" to a suit by a railroad company to collect charges according to the published tariff rates on interstate business operates in this case and should prohibit the railroad company from raising the defense of confiscation to a suit by the shipper to collect overcharges occasioned by departures from the regular tariff rates.

The defense which the defendant seeks to interpose in this case would not be available to the shipper under the same facts. That defense is therefore lacking in mutuality, and should not be tolerated in a court of equity. The carrier which is aggrieved by a schedule of rates has its remedy just as the shipper is given a means of redress against oppressive rates. The shipper appeals to the Interstate Commerce Commission, but has no right to defend an action for undercharges on the ground of confiscation. The carrier may appeal to the courts for an injunction against the enforcement of the unremunerative schedules, but if that action is dismissed it should have no right to defend a suit for overcharges on the ground of confiscation.

It is respectfully submitted that the motion of the complainant to strike paragraph 10 from the answer of the defendant in this case should be allowed.

Respectfully submitted.

W. T. Alden,
As Amicus Curiae.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

STATE OF MISSOURI,
Complainant,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Defendant.

Original.
No. 16,

BRIEF AND ARGUMENT OF ERNEST E. WATSON AND HERBERT A. ABERNETHY, AMICI CURIAE, REPRESENTING CERTAIN SHIPPERS.

ERNEST E. WATSON,
HERBERT A. ABERNETHY,
As Amici Curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

STATE OF MISSOURI, *Complainant,* vs. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Defendant.*		Original. No. 16,

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STATEMENT.

This brief is presented as amici curiae at the permission and on the order of this Court.

We represent several thousand shippers whose overcharges against the defendant and the several carriers in the state of Missouri aggregate large sums of money. Although none of these shippers is a party to this cause, each and all of them are vitally concerned in the principles of law and of equity here in controversy.

These said shippers have filed suits in the state courts of Missouri against the solvent railroads, including the defendant herein, to recover the excess charges above the statutory rates, and they have also filed intervening petitions in the receivership proceedings in the federal courts against the insolvent railroads for said overcharges, and

to each of the petitions the railroads have interposed the following defenses:

First. That the rate statutes of 1905 and 1907 as applied to the railroads between the years 1905 and 1914 are confiscatory;

Second. That the only remedy the shippers had is on the ten thousand dollar bond given by the railroads in the so-called Missouri Rate Cases:

Third. That the statutes of limitation have barred the shippers from recovering the overcharges, although the injunction in the said rate cases was not dissolved until February 7, 1914.

In this cause now before this Court the same defenses are pleaded by defendant.

In brief, this cause is brought by the State of Missouri against the Chicago, Burlington & Quincy Railroad Company for the recovery of excess passenger fares paid to the defendant by the complainant during the pendency of the litigation and injunction before this Court in the case of *Knott* v. *Chicago, Burlington & Quincy R. Co.,* 230 U. S. 474, 57 L. Ed. 1572, the original case being before this Court on appeal and cross appeals from decrees of the circuit court entered March 8, 1909, as amended April 17, 1909, adjudicating the maximum freight rate acts passed by the legislature of the State of Missouri in 1905 and 1907, and the maximum passenger fare act passed in 1907 to be confiscatory and enjoining their enforcement, 168 Fed. 317.

At this time there is before the court motion of the complainant to strike out paragraph 10 of defendant's answer, said paragraph being as follows:

> "(10) The act of 1905 and the acts of 1907 aforesaid was and is unconstitutional, invalid and void, for that it at all times it was in force deprived defendant of its property without due process of law, denied to it the equal protection and were confiscatory, contrary to the provisions of the Constitution of the United States and the amendments thereto, and did not permit defendant to earn a fair or reasonable return upon the actual value of its property necessarily devoted to the service rendered, and that the compensation provided in the act of 1907 aforesaid did not pay the cost of service rendered. The facts in relation thereto were in detail pleaded by defendant in the former actions referred to, and to such pleadings defendant now refers with the same effect as if copied herein, and will, if deemed necessary, again plead such facts in as full detail as heretofore pleaded."

for the reason that said paragraph does not constitute a defense to the bill of complaint.

ARGUMENT.

The Question of Confiscation as to the Past Is Res Adjudicata.

In the original proceedings in the Missouri Rate Cases (155 Fed. 220; 161 id. 419; 168 id. 317), the following issues were before the court:

(1) the validity of the commodity rate statutes of 1905;

(2) the validity of the commodity rate statutes of 1907;

(3) were the Missouri maximum rate statutes void because of being a direct burden on interstate commerce?

(4) were the Missouri maximum rate statutes confiscatory?

On the original appeal to this Court all of the above issues were adjudicated. The question of "confiscation" was adjudicated as to all time prior to the mandate. The mandate left open the question of "confiscation" as to the future, so that the carriers, including this defendant, might commence other proceedings of like nature whenever proofs might be obtainable as to a subsequent period of time, but not as to the past.

It is true the bill was dismissed without prejudice; but this did nothing more than leave the defendant the opportunity of filing a new bill in chancery and again raising the question of confiscation as of a different period of time; but as to the period prior to the mandate the issue was closed and adjudicated. This contention is substantiated by the language of this Court when in *Wadley*

Southern Ry. v. Georgia, 235 U. S. 651, at page 663, it said, (Italics ours):

> "Whether they were reasonable or not, was not apparent on the face of the statute, but was dependent upon the proof of extrinsic facts. How doubtful and uncertain that then was, is illustrated by the fact that in the Minnesota Rate Cases (230 U. S. 352, 472, 473) these legislative rates were subsequently held to be confiscatory as to some carriers and *as to others not confiscatory*."

The Missouri maximum rate statutes are presumed to be valid, and it is the duty of the courts to declare them valid unless they clearly transgress some limitation upon the power of the legislature imposed by the state or federal constitution.

Mathison v. Mpls. Street Ry. Co., 126 Minn. 286;
Union Pacific Ry. v. U. S., 99 U. S. 700, 25 L. Ed. 496;
Powell v. Pennsylvania, 127 U. S. 678, 32 L. Ed. 253;
Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714, 731.

And as said by the learned court in *Southern Ry. Co. v. Railroad Commission*, 196 Fed. 558, at page 560, thus:

> "Legally speaking, a rate statute must be held good until it is shown by the proof, as applied to a particular carrier, that the statute will prevent a fair and reasonable return, upon the value of the property employed in the service, and until that is shown, the rate statute must be held to be prima facie valid, and if it be afterwards repealed, shippers and passengers, as to transactions completed while it was in force, in the absence of a judicial condemnation of the rates, have a vested right of action against the carrier for any excess charges above those allowed by the repealed statute while it was in force."

The Missouri maximum rate statutes were enjoined for the purpose of testing their constitutionality, and the effect of the injunction was to suspend the enforcement of

the statutes pending the determination of that question, (i. e., the question of confiscation). When these injunctions were dissolved and the bills were dismissed without prejudice, the statutes became effective as of the date of their passage.

The sole effect of the injunction was to suspend for the time being the shippers' remedy to recover the amounts paid in excess of the statutory rates. As soon as the injunctions were dissolved and the bills dismissed, the shippers and passengers were at once reinvested with their remedy. It was not until the entering of the decree by the court below on the mandate of this Court that the shippers had the right to prosecute their causes of action for these overcharges. By reason of the injunctions the shippers (including the complainant in this case as such a shipper) lost their ability to sue, that is to say, the shippers were prevented from exercising their remedy. But immediately upon the entering of the decree by the court below, the shippers were set free to assert their causes of action to recover the overcharges paid during the pendency of the so-called Missouri Rate Case litigation. As held in *Power & Ashley v. T. & C. Waters*, 8 Mo. 299, the shippers, after the dissolution of the injunctions, were left to proceed at law on their original causes of action, from the prosecution of which they had been enjoined. In other words, the shippers have the same right of action against the carriers, now that the injunction is dissolved, that they might have had during the pendency of the litigation, if the injunction had not been granted.

McDonald v. Cook, 11 Mo. 635;

Walker v. Pritchard, 135 Ill. 103; 25 N. E. 573.

In other words, after the dissolution of the injunction the shippers were left free to prosecute their causes of action for overcharges.

Roberts v. Fahs, 36 Ill. 268;
High on Injunctions, 4th ed. Vol. 2, Sec. 1667;
Bircher v. Parker, 40 Mo. 118.

As said by the learned judge in *State of Missouri v. Chicago & A. R. Co.*, 216 Fed. 562, at page 564:

> "They ask merely to recover alleged over-payments of rates and charges made under practical duress and in violation of the terms of what has now been adjudged to be valid state regulation."

We contend that in so far as the past is concerned the question of confiscation has been adjudicated by this Court. We contend that the defendant cannot at this time interpose the defense of confiscation, for the following reasons:

(1) The proper, if not the only mode of judicial relief for a carrier against a schedule of freight rates established by the legislature, is by a bill in chancery against the railroad commissioners, the attorney general, and representative shippers, asserting the confiscatory character of the rates thus established, and asking a decree declaring the law to be unconstitutional. In such a proceeding all parties interested in the adjudication of the question are before the court, and the validity of the statute may be determined in one action.

(2) A court of law is not as well adapted to determine the validity of a state statute, especially where it involves a whole schedule of rates, as a court of equity would be.

(3) From the conduct of the carriers (including this defendant), and the circumstances surrounding the so-called Missouri Rate Cases, they should not be permitted to make this defense at this time. They have by injunction prevented the operation of these statutes for a period of some eight years. Through their own fault, and through no fault of the shippers or the officers representing the State of Missouri, THE CARRIERS FAILED IN THEIR SUIT IN EQUITY TO OBTAIN AN ADJUDICATION THAT THE RATES WERE IN FACT CONFISCATORY. After the filing of the decree the carriers immediately put the rates into effect, and although several years have passed, they have not instituted any further proceedings to test the validity of these rates.

(4) As to the future, the courts are open at all times to the carriers for the purpose of testing the constitutionality of these rates, if by reason of changed conditions the rates named are confiscatory at this time, and were not so at the time the Missouri Rate Cases were pending. But they should not be permitted at this late date to test the confiscatory character of these rates as to a period long past.

(5) The condition of business with reference to the operation of railroads has so changed since the time these rates should have been put in effect that a test of the rates now would not afford an accurate criterion from which to judge the confiscatory character of the rates seven or eight years ago.

(6) This court has repeatedly held that a test is the only satisfactory way of determining the reasonableness of a schedule of rates.

(7) It is unfair to demand that one shipper should bear the burden of the extended and costly litigation which is necessary to determine the validity of the schedule of rates involved in these overcharge cases. The carriers themselves have repeatedly and vigorously alleged that a law which imposes upon them numerous penalties for the violation of a rate statute subjects them to such great expense that they cannot afford to resort to the courts to determine the validity of a given rate statute. This being true in respect of a railroad company, it is self-evident that the expense involved in determining the constitutionality of the Missouri maximum rate statutes would absolutely prohibit shippers from maintaining actions to recover excess charges which the railroads collected pending the injunction.

Our contentions are amply substantiated by the holding of Mr. Justice Miller in his concurring opinion in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, at page 982; also by the language of Mr. Justice Peckham in *Ex Parte Young*, 209 U. S. 123, 162-167, 52 L. Ed. 714, at pages 730 and 731; also in the following cases:

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 659, 666; 39 L. Ed. 567, 570, 573;

Southern Pacific R. R. v. R. R. Com. of Calif., 78 Fed. 236, 249;

Haverhill Gas Co. v. Barker, 109 Fed. 694, 696;

St. Louis & San Francisco Ry. Co. v. Hadley, 161 Fed. 419;

St. Louis I. M. & S. R. Co. v. Bellamy, 211 Fed. 172, 178, 179.

Notwithstanding the mandate of this court dismissed the bills "without prejudice," nevertheless the bills of complaint were dismissed, and dismissed as though they had never been commenced. Therefore, it became incumbent upon the carriers (including this defendant) to institute new bills of complaint to test the constitutionality of the rate statutes; and had the railroads filed new bills at that time they could not have raised the constitutionality of the rate statutes as to past facts, but would have raised the confiscatory character of the rates as of the date of the new bills. Such is the situation as it exists today, and so will the situation continue so long as these maximum rate laws remain on the statute books of the State of Missouri.

Respectfully submitted,

ERNEST E. WATSON,
HERBERT A. ABERNETHY,
As Amici Curiae.

Supreme Court, U. S.
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No. 16, Original.

In the

Supreme Court of the United States

October Term, 1915.

STATE OF MISSOURI, *Complainant*,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Defendant*.

BRIEF OF F. W. PASCHAL, AMICUS CURIAE, IN SUPPORT OF MOTION TO STRIKE OUT PARTS OF DEFENDANT'S ANSWER.

F. W. PASCHAL,
Amicus Curiae.

C. B. ALLEN,
of Counsel.



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II.

Where a carrier alleges a rate to be confiscatory it may litigate the question by enjoining the representatives of the state. It cannot litigate the question against individuals. This would be a collateral attack, and as a direct method is provided that method is exclusive 27

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STATE OF MISSOURI, *Complainant*,

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BRIEF OF F. W. PASCHAL, AMICUS CURIAE, IN SUPPORT OF MOTION TO STRIKE OUT PARTS OF DEFENDANT'S ANSWER.

No. 16, Original.

STATEMENT.

This brief is presented as *amicus curiae* at the permission and on the order of this Court:

I represent nearly 3,000 shippers whose overcharge claims against this defendant aggregate the sum of nearly $200,000.00. These claimants

are farmers and shippers residing in Northwestern Missouri, and, although none of these parties is a party to this instant case, each and all of them are vitally concerned in the principles of law and equity in controversy herein.

The complainant filed in this Court a motion to strike out paragraph number 10 of defendant's answer, which paragraph pleads confiscation. The motion to strike out is as follows:

"Now at this date comes the complainant herein, the State of Missouri, through its attorney-general, and moves the court to strike out paragraph 10 of defendant's answer as found on page No. 6, said paragraph being in words and figures as follows:

'(10) The act of 1905 and the acts of 1907 aforesaid was and is unconstitutional, invalid and void, for that it at all times it was in force deprived defendant of its property without due process of law, denied to it the equal protection and were confiscatory, contrary to the provisions of the constitution of the United States and the amendments thereto, and did not permit defendant to earn a fair or reasonable return upon the actual value of its property necessarily devoted to the service rendered, and that the compensation provided in the act of 1907 aforesaid did not pay the cost of service rendered. The facts in relation thereto were in detail pleaded by defendant in the former actions referred to and to such pleadings defendant now refers with the same effect as if copied herein, and will, if deemed necessary, again plead such facts in as full detail as heretofore pleaded.'

For the following reasons, to-wit:

First. Because said paragraph of said answer constitutes no defense to the bill of complaint.

Second. That defendant cannot plead confiscation in this case because that question was settled and finally adjudicated against this same defendant as to the overcharges herein sued for (230 U. S. 474) and defendant must restore and return to the complainant all money taken during the pendency of said injunction.

Third. Because it appears upon the face of the pleadings that said portion of said answer contains allegations and matters wholly irrelevant and immaterial to the determination of this cause.

Fourth. Because said matters do not constitute any defense to this action.

Fifth. Because it appears upon the face of the pleadings that defendant railroad secured an injunction against complainant and all shippers and passengers and while said injunction was in effect illegally charged and collected excessive passenger rates from complainant and others and that the Supreme Court of the United States held that such collections were unwarranted, and to permit defendant to retain said overcharges and to again litigate the question of confiscation and destroy said former adjudication would be contrary to the fundamental principle of equity.

Wherefore, complainant prays that paragraph 10 be stricken out and for naught held."

This defendant Railroad, together with other railroad companies in Missouri, secured an injunction against the passenger and freight rate

laws, alleging that they were confiscatory. (168 Fed. Rep. 317.)

The Supreme Court of the United States in the Missouri rate cases, 230 U. S. 471, held as to this defendant Railroad that it had failed to sustain its plea of confiscation and reversed the case with directions for the lower court to dissolve the injunction and dismiss the bill, without prejudice, which has been done. (*Railroad Co.* v. *Barker*, 210 Fed. Rep. 902.)

Therefore, all of that litigation is at an end.

The State of Missouri thereupon brought suit in the Supreme Court of the United States to recover of the defendant Railroad the money belonging to the State for the traveling expenses of its officers during such injunction.

The defendant Railroad thereupon by said paragraph 10 again alleges that the maximum freight and passenger rate laws of 1907 were confiscatory and wishes again to litigate the question of confiscation.

Complainant, the State of Missouri, has filed its motion to strike out this plea of confiscation on the ground that that matter was determined when the case was in this Court before and that defendant railroad cannot again litigate the question of confiscation.

The farmers and shippers represented by your *amicus curiae* claim that during the time the maximum freight and passenger laws of 1905 and 1907 referred to in the complaint filed herein were in effect, and during the time the injunction mentioned in said complaint was in force and effect, that they shipped many thousands of cars

of livestock and grain over the defendant road, and within the State of Missouri, all of which shipments had their initial and terminal points in said State, and that as a condition upon compliance with which alone the defendant Railroad Company would accept such shipment for transportation and delivery, the defendant charged and exacted of said shippers and that such shippers under compulsion and having no other available method in which to procure such transportation, except by yielding to such exaction, were compelled to pay and did pay to defendant and defendant did receive and retain from such shippers freight charges for the transportation of the commodities at a rate in excess of the statutory rate provided, which is and was the lawful and legal rate, and that defendant at all times has refused and now refuses to rebate to such shippers any part of the excess.

In behalf of such shippers, your *amicus curiae* has filed a large number of suits in the circuit courts of the State of Missouri, which suits are now pending, and to which the defendant herein has interposed the same defense as that set forth as number 10 in the answer filed herein, and to which the Motion of Complainant in this suit to Strike Out, is directed.

It will, therefore, appear to this Court that the several shippers represented by your *amicus curiae* are vitally interested in this motion.

Your *amicus curiae* has carefully read the brief and argument filed herein by the Honorable John T. Barker, attorney-general of the State of Mis-

souri, and desires to endorse such brief and argument as stating the law of this case.

In this brief I will discuss what I deem to be the issues under the following topics outlined by the attorney-general:

First. "The injunction suit brought by defendant Railroad in the District Court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunction or decree must be restored to complainant and defendant will not be heard to deny such right and cannot plead that such rates were confiscatory. Therefore such plea should be stricken out."

Second. "Where a carrier alleges a rate to be confiscatory it may litigate the question by enjoining the representatives of the State. It cannot litigate the question against individuals. This would be a collateral attack, and as a direct method is provided that method is exclusive."

BRIEF.

I.

The injunction suit brought by defendant Railroad in the District Court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunction or decree must be restored to complainant and defendant will not be heard to deny such right and cannot plead that such rates were confiscatory. Therefore such plea should be stricken out.

Love v. *N. Am. Co. et al.* (U. S. C. C., Dec. 1915).
Missouri Rate Cases, 230 U. S. 474.
Bellamy v. *Railroad*, 220 Fed. Rep. 876.
3 Cyc. 462-469.
18 Encyc. Pl. & Pr. 871.
Section 481, 2 Freeman on Judgments (4th Ed.), 832-834.
Section 343, 1 Beach on Injunctions, 348.
Section 1096, Spelling on Injunctions and Other Extraordinary Remedies.
Section 343, 1 Joyce on Injunctions, 525.
Carson v. *Suggett*, 34 Mo. 364.
Turner v. *Edmonsten*, 210 Mo. 411.
City of St. Louis v. *Gaslight Co.*, 70 Mo. 69.
City of St. Louis v. *Gaslight Co.*, 82 Mo. 349.
Haebler v. *Meyers*, 132 N. Y. 363.

Railway Co. v. *Taylor*, 134 Ill. 603.
Starke v. *Lewis*, 23 Miss. 151.
Savannah Shoe Co. v. *Kaiser*, 108 Ga. 767.
City of New York v. *Brown*, 179 N. Y. 303.
Chicot Lumber Co. v. *Darnell*, 84 Ark. 140.
Pulteney v. *Warren*, 6 Ves. Jr. 73.
Cumming v. *Mugge*, 94 Ill. 186.
Vanzandt v. *Mining Co.*, 2 McCr. 642.
Railroad Co. v. *Barker*, 210 Fed. Rep. 902.
Hawkes v. *Champion*, Cary 51.
Douche v. *Perrot*, Cary 63.
Hill v. *Portman*, Cary 140.
Bank v. *Bank*, 6 Pet. 8.
Northwestern Fuel Co. v. *Brock*, 139 U. S. 216.
Ex Parte Walter Brothers, 89 Ala. 237.
Zimmerman v. *Bank*, 56 Iowa, 133.
Lytle v. *Lytle*, 94 N. Car. 522.
Fleming v. *Riddick*, 5 Gratt. (Va.) 272.
Hier v. *Brewing Co.*, 60 Neb. 320.
Thompson v. *Reasoner*, 122 Ind. 454.
United States v. *Rithstein*, 187 Fed. Rep. 268.
Brown v. *Detroit Trust Co.*, 193 Fed. Rep. 672.
Simmons v. *Price*, 18 Ala. 405.
Ward v. *Sherman*, 155 Cal. 287.
Hess v. *Deppen*, 125 Ky. 424.
Bryant v. *Fairchild*, 51 Me. 149.
Delano v. *Wilde*, 11 Gray (Mass.) 17.
Peck v. *McLean*, 36 Minn. 228.
Thompson v. *Carroll*, 36 N. H. 21.
Scott v. *Conover*, 10 N. J. L. 61.
Murray v. *Berdell*, 98 N. Y. 480.
Britton v. *Phillips*, 24 How. Pr. 111.
Bickett v. *Garner*, 31 Ohio St. 28.
McFadden v. *Swinerton*, 36 Ore. 336.
Whitrell v. *Peck*, 176 Pa. St. 170.
Gates v. *Trinkley*, 4 Lea (Tenn.) 710.

Perticales v. *Carpenter*, 53 Tex. 23.
Standard v. *Brownlow*, 3 Munf. (Va.) 229.
Keck v. *Allender*, 42 W. Va. 420.
Singly v. *Warren*, 18 Wash. 434.
Knoxville v. *Knoxville Water Co.*, 212 U. S. 153.
Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19.
Des Moines Gas Co. v. *Des Moines*, U. S. Adv. Ops. (Aug. 1, 1915) 811.
St. Louis & San Francisco R. R. Co. v. *Barker*, 210 Fed. Rep. 912.
State ex rel. Barker v. *Chicago & Alton Ry. Co.*, 216 Fed. 564.
Wadley Southern Ry. v. *Georgia*, 235 U. S. 651.

II.

Where a carrier alleges a rate to be confiscatory it may litigate the question by enjoining the representatives of the State. It cannot litigate the question against individuals. This would be a collateral attack, and as a direct method is provided that method is exclusive.

In re Englehard & Sons Co., Petitioners, 231 U. S. 645, 58 L. Ed. 416.
R. R. Co. v. *Minnesota*, 134 U. S. 418.

ARGUMENT.

I.

The injunction suit brought by defendant Railroad in the District Court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunction or decree must be restored to complainant and defendant will not be heard to deny such right and cannot plead that such rates were confiscatory. Therefore such plea should be stricken out.

It is well stated in the language of the able attorney-general that:

> "Defendants will not be heard to question the legality or constitutionality of the maximum freight and two-cent passenger fare laws in this action. If the rates charged were the statutory and lawful rates then the confiscatory character of said rates could not be in issue, because, clearly, the defendant could not be liable for exacting the lawful rate of charges. On the other hand, if it did charge rates in excess of the statutory rates, it did so of its own free will, and exacted and obtained from shippers and passengers (of which this complainant was one) such excess charges during the pendency of, and under duress of, the injunction, sued out to test the confiscatory character of said rates. The

United States Supreme Court reversed the judgment and order of the United States Circuit Court at Kansas City, and dissolved said injunction. Said injunction was held to be wrongful and unlawful.

Therefore, defendant must restore whatever advantage, money or property it obtained from complainant by reason of said injunction. It necessarily follows that a plea of the confiscatory character of the rates has no place in and will not be tolerated in the present controversy. To permit such a plea here would be to prostitute a court of equity to the partisan purpose of aiding one party to a suit to obtain an unconscionable advantage of another, and would make of its high processes engines of oppression and wrong, instead of instruments of justice, equity and good conscience. The party who wrongfully obtained the injunction must restore the fruits obtained by his wrongful acts."

Restitution was a remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed "that the defendant be restored to all things which he has lost on occasion of the

judgment aforesaid." A writ of restitution was thereupon issued, provided the amount that the appellant had lost or paid under compulson appeared of record, as by the return of an execution satisfied; otherwise process in the nature of an order to show cause was first issued, known as a "*scire facias quare restitutionam habere non debet.*" Toml. Law Dict., title Restitution; 2 Lil. Abr. 472; Rolle, Abr. 778; *Westerne* v. *Creswick*, 4 Mod. 161; *Wilkinson's Case*, Cro. Eliz. 456; *Goodyere v. Ince.*, Cro. Jac. 246; *Manning's Case*, 8 Coke 94; 2 Tidd, Pr. 1033; 1 Burrill, Pr. 292.

In *Ex Parte Walter Brothers*, 89 Ala. 237, the court, applying the doctrine of restitution, stated:

> "We are unable to concur with counsel who appear against the application that money paid on, and in obedience to a decree of the chancery court, can, in any case, said to be paid voluntarily, in such sort as to preclude its recovery in the event of a reversal of the decree. We understand law to be settled to the contrary. * * *
>
> *We can conceive of no case in which a party, who pays money on a decree which is subsequently reversed, is not entitled to have restitution of what he has paid, and to be thus reinstated in the position and to all the rights he lost prior to the rendition of the erroneous decree.* It is not material what those rights were, or would probably, or ever certainly and necessarily, be determined to be, in the further progress of the litigation. He is entitled to have his final equities ad-

judicated while he yet occupies whatever vantage ground was his in the inception of the contest, and from that standpoint to invoke the judgment of the law on the issues he presents. When he asks, after the reversal of a decree which has erroneously adjudged his rights and disturbed his relations in the case, to have his original status restored, it is no answer to his petition to say that, on a final hearing of the cause, it will again be decreed that he pay that of which he now seeks restitution. To so hold would be to prejudice the case, to decide in advance of the submission of the issues on pleading and proof that the party, who has been put to a disadvantage by the execution of a wrongful decree, though properly before the court, is not entitled to any relief in the case. On the one hand, we are unable to see any predicate for the claim of the other party to retain what, confessedly, he has wrongfully received. He has no right to the money involved in the litigation, in contemplation of law, until there should be a correct determination of the matters in dispute, however clear his rights may have been in point of fact. He, therefore, proceeds with the cause, having an undue advantage of his adversary, and is in fact in the attitude of having gained what he claimed before his right to it had or could have been determined. We entertain no doubt therefore of the absolute right to have restitution made on the one hand, and the absolute correlative duty to make restitution on the other, wholly regardless of considerations looking to the final equities of the parties."

In *Brown* v. *Detroit Trust Company*, 193 Fed. Rep. 672, the Circuit Court of Appeals for the Sixth Circuit again stated the doctrine to be applied, where it said on page 626:

> "Certainly, if restitution is possible, the judgment appealed from would be affected by the reversal. In the courts of the United States the rule is broadly settled that upon the reversal of an erroneous judgment the law raises an obligation in the party to the record who has received the benefit of the judgment to make restitution to the other party for what he has lost, and that the mode of effecting this result may be regulated according to circumstances. See *Bank of United States* v. *Bank of Washington*, 6 Pet. 8, 8 L. Ed. 299; *Ex Parte Morris & Johnson*, 9 Wall. 605, 19 L. Ed. 799; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 221, 11 Sup. Ct. 523, 35 L. Ed. 151."

In *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 35 L. Ed. 151, *Bank* v. *Bank*, *supra*, is heartily affirmed, where the court said, beginning on page 219:

> The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there has been as to the proceedings to enforce the restitution. Thus in Anonymous, 2 Salk. 588, it was held by Holt, Ch. J., that "where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed there, because it appears on

> the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid, there must then be a *scire facias* suggesting the matter of fact, viz., the sum levied, etc."

The same doctrine has been fully recognized by this Court in *United States Bank* v. *Bank of Washington*, 31 U. S. (6 Pet.) 817 (8: 200, 304). In that case the court, after observing that the party against whom an erroneous judgment has been enforced does not lose his remedy against the party to the judgment, said:

> "On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost, and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is (936) to be restored. 2 Salk. 587, 588; Tidd's Pract. 1137, 1138. And no doubt circumstances may exist where an action may be sustained to recover back the money."

We are of opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the court, and that all need-

ed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties, the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction.

What Did Dismissed Without Prejudice Mean?

It is to be noted that in the injunction case in the U. S. Circuit Court at Kansas City, brought by defendant and other railroads to restrain the enforcement of the rate laws, the decree of the court was reversed and the bills ordered dismissed as to eleven of the railroads (of which the defendant was one), and the decree was affirmed as to other of said railroads. As to the bills ordered dismissed, the decree was to be "without prejudice." Likewise in the cases affirmed the decree was without prejudice. True, the latter decree did not use the term "without prejudice," but it did say, "the decree in these three cases will accordingly be affirmed with the modification that the Railroad and Warehouse Commissioners and the attorney-general of the state may apply at any time to the court by bill or otherwise, as they may be advised, for further orders and decrees whenever it shall appear that by reason of change in circumstances the rates fixed by the state act are sufficient to

yield these companies reasonable compensation for the services renderd." (Missouri Rate Cases, 230 U. S., l. c. 474.)

I desire to call this Court's special attention to the wording of this decree. It cannot be denied that the United States Supreme Court is an impartial tribunal, and that it was not intended by this Court that the Railroads could again litigate the confiscatory character of said rates (as to the period during which the injunction was pending), and that the State could not. Plainly the State could not go into court and again sue either of the three railroads, mentioned in that part of the decree just quoted, to recover overcharges during the period covered by the injunction, and seek to make a showing of facts, during that period, different from those shown in the injunction suit, and thereby obtain a recovery. But as to the future, upon a showing that the rate statutes are compensatory, it might maintain such a suit. This is the plain meaning of the decree as to the cases in which the decree was affirmed.

An examination of the opinion in the Missouri Rate Cases, 230 U. S., discloses that the cases were disposed of upon a consideration of the evidence and that the bills that were dismissed, as to eleven railroads, were not dismissed upon a technicality, but because the evidence did not show the rates to be confiscatory.

Defendant insists that when sued for overcharges, exacted in excess of a statute rate, which the Supreme Court did not find confiscatory, it can go again all over the question of the confiscatory character of said rates, simply because

the court dismissed the bills "without prejudice." If that contention be true, then in the language of the learned attorney-general, it "convicts the highest court in our land of denying to the shippers and passengers of the State of Missouri a right accorded to the railroads of this State; of leaving the question open when urged by the railroads, while it shuts the door of opportunity and forecloses the question when urged by shippers and passengers against the railroads; of permitting the complainants in the rate injunction suits to obtain an unconscionable advantage of the shippers and passengers, of which this complainant is one; and of taking away the rights of said shippers and passengers and arbitrarily conferring them upon this defendant and other railroads."

The Supreme Court could never have intended any such result when it added the words "without prejudice" to its decree dismissing the bills in the rate cases. The plain meaning of that decree is that the question of the confiscatory character of the rates is still open as to the future, "whenever it shall appear that by reason of change in circumstances" that the rates are confiscatory (as to the eleven railroads) or compensatory (as to the other six); but that as to charges exacted during the pendency of the injunction, the question is forever foreclosed as to all parties.

In the Missouri Rate Cases, 230 U. S., p. 474, L. Ed. Vol. 57, p. 1571, the United States Supreme Court said:

> "We can reach no different conclusion from that stated in the decisions to which we have

> referred, that in an issue of this kind, involving the constitutional validity of the State's action, general estimates of the sort here submitted with respect to a subject so intricate and important should not be accepted as adequate proof to sustain a finding of confiscation. *Simpson* v. *Shepard, supra.* For the reasons that have been set forth we must conclude that, save in the cases mentioned below, the complainants failed to sustain their bill."

The court continues, as to some of the excepted cases, as follows:

> "The decree in these three cases will accordingly be affirmed with the modification that the Railroad and Warehouse Commissioners and the attorney-general of the State may apply at any time to the court, by bill or otherwise, as they may be advised, for further orders and decrees whenever it shall appear that by reason of change in circumstances the rates fixed by the State act are sufficient to yield these companies reasonable compensation for the services rendered."

The court further observed:

> "The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and each complainant, in order to succeed in assailing them, must show that as to it the rates are confiscatory."

And the court further ordered in that case, that the cases in which the judgment of the lower

court was reversed were to be remanded with directions to dismiss the bills respectively "without prejudice."

This meant, and could only mean, that not only had the court found the statutes fair on their face, but it also found that their application to the defendants for the years from 1905 to 1914 was a constitutional application of that rate.

"Dismissed without prejudice" simply meant that if in the future conditions so changed that the defendant could show for a period of time subsequent to the decree that the rates did not provide a sufficient income, the defendant would then have an opportunity to appeal to the court for a suspension as to it of the application of the statutes for that period of time. But so far as the period of time between 1905 and 1914, involved in this case, the question of the reasonableness of the rate and its proper application to the defendant companies had been forever foreclosed.

In *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371, a somewhat similar situation was presented, and clearly shows what the court meant in the Rates Cases by the words "without prejudice." The court there said:

> "If hereafter it shall appear, under the actual operation of the ordinance that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or the courts of Tennessee."

> "As the case now stands, there is no such certainty that the rates prescribed will necessarily have the effect of denying the company such a return as would avoid confiscation. For these reasons the decree is reversed and the case remanded to the court below with directions to dismiss the bill without prejudice."

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, the court said:

> "It may possibly be, however, that a practical experience of the effect of the act, by actual operation under them, might prevent the complainant from obtaining a fair return as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill, without prejudice. It is so ordered."

In the case of *Des Moines Gas Co.* v. *City of Des Moines*, U. S. Adv. Ops. 1914 (Aug. 1, 1915), p. 811, the court again said:

> "We think this is particularly so in view of the fact that ordinarily, time alone can demonstrate in a case like this whether or not the rates as established will prove to be so unremunerative as to be confiscatory in the sense in which that term has been defined in the rate-making cases. With that modification that the bill be dismissed without prejudice, instead of, as the court below directed, with prejudice, the decree is affirmed with costs."

If it had been the idea of the Supreme Court that the defendant Railroad Company should have another opportunity to present proof as to the

constitutional application of that rate between the years 1905 to 1914, it would have "reversed the case without prejudice" and so indicated to the trial court that it was its desire to have further evidence adduced in order that they might determine that question.

This was the language used in case of *In re City of Louisville*, 231 U. S. 639, 58 L. Ed. 413. *Instead, the mandate here was to dismiss the case.* The court had passed upon the application of those statutes to defendant for the years 1905 to 1914. The court desired no further evidence as to that period of time. *The defendant had had its "day in court" as to those years.* The bill was to be dismissed, but with nothing attached to the order to prevent another application after the actual operation of the statute to relieve defendant of its application for that subsequent period of time.

That this decision had settled this particular question was also the view of the Railroad Company when it appeared before Judge McPherson in the Western District and asked him to enter the final decree in the cause.

In *St. Louis & San Francisco R. R. Co.* v. *Barker*, 210 Fed. 912, appears the following:

> "The other 13 companies from the time of final decrees herein until the 1st of July last did charge in excess of 2 cents per mile per passenger, and did charge for intrastate freight more than the statute allowed. And the only question now presented is as to what shall be done by way of procedure for the recovery back of such excess passenger rates and freight rates during the time the state statutes were not observed."

Again, on page 917 of same opinion, it is said:

> "The Railway Company insists that by the appointment of a master these moneys and the rightful claimants could be ascertained and payment made within a few months."

Again, on page 918, it is said:

> "And for that purpose a master will be appointed, but those claimants who do not thus elect to come into this Court will not be bound so to do by any order of this Court. They are left free to go to such courts as they may elect."

In this case not only was the constitutionality of the statute conceded, but that it was constitutionally applied to the defendant for the years between 1905 and 1914 was also conceded.

To permit defendants to assert title to money or property exacted and obtained from it while it was restrained by a wrongful injunction and decree of the court since reversed, would be to overturn the very foundation principles of equity, and make an equity court and its processes and decrees engines of wrong and oppression, instead of instruments toward justice and right.

In Section 343, 1 Beach on Injunctions 348, it is said:

> "Where the act sought to be enjoined is done before the complainant's bill is filed, and he knows it is already done, a preliminary injunction issued to prevent the act is improvident and will properly be dissolved on the hearing, and if plaintiff in such a case has obtained an advantage by acting when his op-

> ponent's hands are tied, he will be compelled to relinquish it, so that the original status may be restored."

The same rule is laid down in Joyce on Injunction, Vol. 1, Sec. 343.

In *Railway Co.* v. *Taylor,* 134 Ill. 603, it is said:

> "And so it must necessarily follow that to allow one party to obtain an advantage by acting when the hands of the adverse party are thus tied by the writ or order for it, is an abuse of legal process which cannot be tolerated. It is immaterial here in whom is the legal title; those questions cannot be determined here. It is sufficient, for the present, that appellee, after having tied the hands of appellant as to the assertion of its claim of right, and while they were so tied, has changed the *status quo* of the parties in this respect. She must restore things to the same plight and condition, as nearly as possible, in which they were when the judge made the order upon her bill that an injunction issue."

In *Love* v. *North American Company et al.,* decided December 4, 1915, by the United States Circuit Court of Appeals for the Eighth Circuit, a suit for overcharges and incidental to the receivership of the St. L. & S. F. R. R. Co., the court said:

> "There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates

> were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity that has taken over the business of a public carrier by means of a receivership ought to be equally careful to enforce."

The same advantages were obtained by defendant, by virtue of the wrongful injunction, obtained through the United States Circuit Court at Kansas City. But for that injunction, the money which complainant seeks to recover would still be in its treasury. But for that injunction, it would never have been deprived of or lost its property. But for that injunction, it would not now be met with the plea of the statute of limitations, but, on the contrary, might have pleaded it itself, if it had been sued to recover back the difference between what it had paid and what was compensatory, if the statutory rates had been held invalid. But for that injunction, no money would have been obtained from complainant, and it would not now be here seeking redress.

Having failed in its suit to strike down the rate statutes, and having obtained the money of complainant by virtue of its own voluntary wrong by exacting charges in excess of a statutory rate that stands valid to this day, will a court of equity permit defendant Railroad Company to retain the

fruits of its own wrong while it again attempts to litigate the validity of said statutes? What could be more unconscionable? What more subversive of the basic principles of equity?

In the original Missouri Rate Cases (155 Fed. Rep. 220, 161 *id.* 419, 168 *id.* 317), the following issues were presented to and considered by the court:

(1) The validity of the commodity rate statutes of 1905.

(2) The validity of the commodity rate statutes of 1907.

(3) Were the maximum rate statutes void because of being a direct burden on interstate commerce?

(4) Were the Missouri maximum rate statutes confiscatory?

The above questions were adjudicated by this Court. The defense of "confiscation" was certainly adjudicated as to all time prior to mandate; the mandate left the future question of confiscation open to the defendant herein, so that it might commence its proper proceedings to again test that question, whenever proofs might be attainable, as to a subsequent period of time, but not as to the past.

It is true, the bill was dismissed without prejudice, but this did nothing more than leave the appellant the opportunity of filing a new bill in chancery, and again raising the question of confiscation as of a different period of time; but, as to the period prior to the mandate the issue was closed and adjudicated. This contention is substantiated by the language of this Court when, in

Wadley Southern Ry. v. *Georgia*, 235 U. S. 651, at page 663, it said:

> "Whether they were reasonable or not was not apparent on the face of the statute, but was dependent upon the proof of extrinsic facts. How doubtful and uncertain that then was, is illustrated by the fact that in the Minnesota Rate Cases (230 U. S. 352, 472, 473) these legislative rates were subsequently held to be confiscatory as to some carriers and as to others not confiscatory."

II.

Where a carrier alleges a rate to be confiscatory it may litigate the question by enjoining the representatives of the state. It cannot litigate the question against individuals. This would be a collateral attack, and as a direct method is provided, that method is exclusive.

The rule has been well established in recent years that if a carrier desires to litigate the question of confiscation, it must do so with the governmental authorities. In this case the railroads litigated this question with the officers of the State and when the bill was dismissed below upon order of this Court, the Railroad put the statutory rates into effect and thus acquiesced in the ruling of this Court, and the railroads cannot now deny and defy the decisions of this Court.

In the case of *In re Englehard & Sons Co., petitioners*, 231 U. S. 646, 58 L. Ed. 416, this Court, in passing upon this identical question, at page 418, laid down the rule above contended for in language which cannot be misunderstood, when it said:

> "It is the universal practice sustained by authorities that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them, or is charged with the duty of enforcing them."

In the case of *Chicago, M. & St. P. Ry.* v. *Minn.*, 134 U. S. 418, 33 L. Ed. 970, Mr. Justice Miller again reiterated and reaffirmed this doctrine, that a carrier cannot litigate questions of confiscation against a shipper or passenger. He said:

> "That until this is done (a decision in equity in which the public was represented) it is not competent for each individual who has dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest over the question which ought to be settled in this general and conclusive method."

Conclusion.

In view of the foregoing authorities, and of the able briefs filed herein, by the attorney general and others, I cannot but conclude that the defend-

ant in this action has no right to again try the question of confiscation for the years involved in the present proceeding, and that the motion of the attorney general to strike paragraph ten from the answer of the defendant should be sustained.

Respectfully submitted,

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